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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

ALWIN E. HOPFMANN, GREGORY HESSION, CLARENCE PERKINS, CLARENCE PAULIN, and BETH SULLIVAN,

Appellants,

v.

MICHAEL JOSEPH CONNOLLY, FRANCIS X. BELLOTTI, CHESTER G. ATKINS, and THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Jurisdictional Statement

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QUESTIONS PRESENTED

1. Is the unanimous decision of this Court in Smiley v Holm, 285 US 355 (1932, opinion by Mr. Chief Justice Hughes) overruled ?

2. Does a claimed First Amendment power in political parties to make private rules which can control primary ballot access for candidates and then incorporate the rules into state statutory schemes regulating ballot access conflict with the constitutional scheme for controlling political party or "faction" control of candidates through Art.I, Sec.4, the "Times, Places and Manner Clause," and Art.I, Sec.2, Cl.2, along with Art.I, Sec.3, Cl.3, the "Qualifications Clauses," as interpreted in Smiley, supra, and Powell v McCormack, 395 US 486, respectively. And is the holding below in conflict with this Court's decision in Terry v Adams, 345 US 461, as an attempt to evade the constitutional strictures of

one or both of those clauses by means of an unsanctioned pre-primary convention that excludes candidates from the ballot, or is Terry to be read more narrowly to encompass only attempts to evade the XVth Amendment ?

3. Does such an unsanctioned "jaybird" pre-primary convention of party insiders violate the "Equality Clause" of the XIVth Amendment by giving more weight to the votes of convention delegates than to the rest of the party members who vote at the ensuing official primary up to the point where, as here, one of two candidates may be eliminated from the ballot at the pre-primary convention to leave no choice at the primary ? Does it discriminate invidously against the candidate who lacks party-insider support and in favor of the candidate who does ? Does it make any difference that the rule establishing such a convention was voted on by only a small

number of party members and only a small number attend the convention or participate in the selection of delegates to it ?

4. Does it violate the rights of political association and expression under the First Amendment of all the members of a party who are not part of its inner group for a minority within the party to impose such a jaybird type of unsanctioned pre-primary convention upon "outsider" candidates and those who wish to vote for him ?

5. Does such a claimed constitutional right as that claimed here -- to have a jaybird type of unsanctioned pre-primary convention and use it to screen out candidates not popular with the delegates and to establish the convention by an authority to make rules and incorporate them into state statutes -- violate the system of checks and balances in the

Constitution aginst the intent of its framers ?

6. Is there any support for the claim of a First Amendment right to be able to incorporate private rules into state statutory schemes "as though" they were enacted by a legislature ? Once unilaterally "incorporated" by declaration into the state statutes, is the rule then merely a matter of state law, subject to interpretation by the state's highest court to which this and other federal courts must yield ?

7. Does a jaybird convention for statewide candidates violate the XVIIth Amendment ban on electors being required to have no requirements greater than those imposed upon the electors for the most populous house of the state legislature ? Does it meet the XVIIth requirement of being "by the people ?"

8. Should not the split in the

circuits between the 5th andthe lsts on unconstitutional election cases be resolved in favor of the rule of the 5th circuit that has proven to be the only effective way to stop those in power from abusing the basic right of franchise ?

9. Does the freedom of association give a party inner group a right to have the jaybird type of convention as an added requirement for ballot access ?

10. Was there not a preconceived plan here to hold an unconstitutional election barring ballot access to a qualified candidate and depriving voters of their right to have an effective vote, a remedy for which was timely sought, so that the primary election in 1982 should be voided and a special re-run election held ?

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Jurisdictional Statement

REPORTED OPINIONS BELOW

746 F2d 97, (1st Cir. 1984); remand 105 SCt 2106; 769 F2d 24

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) THE NATURE OF THE PROCEEDING AND THE STATUTORY BASIS FOR JURISDICTION

(A) The Nature of the Proceeding

This case comes back up after unanimous acceptance of cert, vacation and remand. Suit was brought by appellant Hopfmann as a Democratic Party candidate, and by four Democratic voters who wished to vote for him as a candidate unburdened by lack of

primary ballot access. They sued for that access in accordance with a state statutory scheme as prescribed by the legislature and for a declaration that it is a violation of the Constitution for the Secretary of State, appellee Connolly, to forbid access to Hopfmann by treating a Democratic party rule as though it were a law. They sued for damages for civil and constitutional rights violations pursuant to 42 U.S.C. 1983. After the court failed to get to the merits by the September 14, 1982, primary, appellants sought to void the primary which was held with Hopfmann excluded from the ballot and his opponent, Edward M. Kennedy, as the only candidate named (To avoid voter "confusion.")

Appellants seek this last under the 5th Circuit line of unconstitutional election cases in the South commencing with Hamer v Campbell, 358 F2d 215 (1966), and including Bell v Southwell,

376 F2d 659 (1967), the case most directly on all fours with the present one, as well as Brown v Post, 279 F.Supp. 60 (E.D. La.). Appellants contend there should not be a double standard of justice and that the same standard that was applied in the South should apply in Massachusetts.

Appellees argue an inherent right in political parties to make a private rule governing primary ballot access which can then be "added to" a state statutory scheme by the party's unilateral declaration through its inner, rulemaking, group and thereby become law just like statutes passed by the legislature in the normal course of its lawmaking which, when they concern the Times, Places and Manner of electing United States senators or members of Congress pursuant to Art.I, Sec.4, Cl.1., are coincidentally delegated federal law. They argue that this right to make such laws privately and then to

superadd them to those which the legislature has duly passed emanates from the First Amendment to the Constitution of the United States as part of the freedom of association as developed by this Court. Appellants argue that this contention is incompatible with specific language of the Constitution about senatorial elections and qualifications and with the broader concepts of the First and Fourteenth Amendment as they apply to appellants as well as with the Seventeenth Amendment.

Appellees argue that this "right" of private lawmaking has been delegated by the legislature to the inner political party group which exercised it, though they can point to no actual prescription of the legislature which expressly or impliedly makes such a delegation and even though the legislature has rebuffed the rule in question and the extra burden it places upon candidates in every way.

What the private rule in question requires of the candidate is that he or she attend a pre-primary convention of a small group of the party and obtain a certain percentage of the delegate votes there (15 percent) before the candidate may be placed on the ballot. This is an additional burden to the requirements for ballot access placed upon candidates in the state statutory scheme as written, where the principal requirement is the collection and certification of signatures of registered voters (10,000 for a candidate for a party's senatorial nomination.) Appellees argue that the imposition of this extra burden upon candidates is necessary and beneficial to the party even though the party's rank-and-file, in a sample, rejected the idea and have never since been allowed any say in the matter. Appellants argue that such unsanctioned conventions are an attempt to

avoid constitutional safeguards in order to disenfranchise (as it did here) or dilute the franchise of a majority of the party's ordinary membership and are, therefore, unconstitutional.

(B) The Statutory Basis for the Federal Jurisdiction

U.S. Senate races are regulated, in the first instance and in most respects, by the prescription of each legislature, except as Congress shall from time to time regulate by overriding law. This is set in Art.I, Sec.4, Cl.1 of the Constitution, known as the Times, Places and Manner Clause. (As an example of Congress' regulation by override, the start of these races is now defined by overriding federal law as set out in the Federal Election Campaign Act, 2 U.S.C. 431 et seq.). Since this authority is delegated to the state legislatures in the first instance by the Constitution, it is delegated

federal authority prescribed in state law and the state statutes embodying it, uniquely in the federal system, are coincidentally state and federal law. All statutes cited from the General Laws of Massachusetts are both federal and state law to the extent that they regulate federal races for the House and Senate. Secs. 2, 34, 41 and 44 of Ch. 53 and of Ch. 54, Sec. 41, of former Secs. 54, 54C and 54D of Ch. 53, and Mass. Acts 1973 c. 429, that repealed these last sections. Indeed, the 15% rule would be federal law if the appellees were right.

Also at issue are Art.I, Sec.3, Cl.3, the First, XIVth and XVIIth Amendments, 42 U.S.C. 1983, and 28 U.S.C. 1652, which compels federal courts to recognize state statutory schemes under independent state interpretation but not as distorted by novel extensions of federal rights.

(ii) DATES BELOW

Date of order and judgment below: July 31, 1985. Rehearing den. Sept. 23, 1985; Notice of Appeal filed Dec. 13, 1985.

(iii) THE STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION ON THIS COURT is 28 U.S.C. 1254 (2).

Sections 54, 54C and 54D of the Annotated General Laws of Massachusetts, previously, for a period of some years, provided for all political parties to hold pre-primary endorsing conventions. These conventions could endorse one candidate for each office but couldn't bar anyone from the ballot. They provided ballot access in an alternative way to the collection of signatures, not as an added burden on those who qualified by the signature method. By the statute 1973 Mass. Acts, c. 429, these sections were repealed. The pre-primary convention, even in this milder form, was eliminated from the state statutory scheme. It can't be

the case, logically, that this 1973 Act repealing pre-primary conventions is valid law and the 15 percent rule establishing a pre-primary convention with even stronger authority pursuant to First Amendment authority is also valid law. If one is valid the other has to be invalid and vice versa. Either pre-primary conventions are legal or they are not.

On remand from this Court's decision the First Circuit ordered the parties to make any arguments not previously made. Accordingly appellants, just in case the argument had not previously been fully developed, raised this point as follows: "In addition, in 1973 the Massachusetts Legislature repealed the power of a Convention to place a name on the primary ballot....Under the analysis of the proponents of the 15% rule, that statute is unconstitutional and both the statute and the rule cannot remain enforceable."

(Appellants' Brief on remand, page 14) Nonetheless, the first circuit again refused to face this issue and avoided saying that the '73 Act was invalidated by the rule being upheld "as though" it were law even though they cannot both stand.

We respectfully submit that this is an attempt to stop appellants from obtaining the appeal they're entitled to. Pre-emption exists and should be recognized. Malone v White Motor Corp., 435 US 497.

Under the theory of the appellees the party inner group that formulated the rule attaches it to the state statutory scheme by exercise of its First Amendment right, despite the will of the legislature that it not do so. There is no legislative history, therefore, of a legislature in the normal sense since legislatures, including the national Congress, are bypassed by such a newfound right in political parties and are not involved in

the actual formulation of the rule which allegedly then becomes part of their laws. Therefore, the legislative history is the history surrounding the formulation of the rule. Even though the rule is paramount federal law under this theory it has no legislative history we can research in the Congressional Record, Committee reports or transcripts of congressional committees. Since the party elite under this novel theory can replace the legislature, and, for that matter, the Congress, the purpose of the elite that formulated the rule is thus "the ultimate touchstone" under the test of Retail Clerks v Schermerhorn, 375 US 96, 103, as applied in Malone, where this Court said the federal courts:

> "normally sustain local regulation of the same subject matter unless it conflicts with or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy to the field to the exclusion of the States." Malone, at 504.

Under the theory of the appellants the rule and the 1973 act conflict under the above standard. To enforce the 1973 Act would clearly frustrate the "federal" scheme of the party vanguard to hold a pre-primary convention and force candidates to get 15 percent of the vote at it. It can clearly be discerned from the totality of circumstances that the party elite, in formulating the 15 percent rule, meant to occupy the field to the exclusion of the '73 statute. The history of the development of the 15 percent rule within the party inner convocations as set out in the record shows this. A 25 man Charter Commission produced documents and reports for the '79 Convention (App. N 1) which adopted the Charter containing the rule. Documents produced by the Charter Commission and circulated at the Charter Convention are in the record and are reproduced in the appendix. The one

entitled: "DEMOCRATIC COMMISSION DRAFTS PARTY CHARTER," (App. M 1) by Jerome M. Mileur, Chairman of the Amherst Democratic Committee, associate professor of political science, University of Massachusetts, and member of the 25 man Charter Commission, said, p. M 2:

> "The proposed charter restores the state convention, which was abolished in 1972 by a Democrat-controlled state legislature....Many local Democrats attributed the deterioration of town and ward committees to the elimination of state conventions; and former House Speaker, David Bartley, at a recent state party gathering...called the vote to repeal the convention, taken during his tenure as Speaker, a 'mistake.'"

So the advocates of the rule intended to repeal the 1973 Act. Another document in the record below that circulated at the Charter Convention was an article from the Harvard campus publication Common Sense, "Unreforming the Parties," by Dobel and Stockton. (App. L 1) It is an unabashed paean to bossism and advocates a return to

smoke-filled room conventions and inside control. A single quote will epitomize and illustrate that it showed an intention to repeal or invalidate the Act that eliminates pre-primary conventions, (p. L 30): "First, all party decisions relating to policy and candidates should be made by conventions at which no more than one half of all delegates are chosen by primaries."

That this intention was transferred from the idea of enacting new legislation to undo the '73 repeal to the concept of First Amendment power in the party to restore the convention without legislative action was also in the legislative history of the rule at the '79 Charter Convention. Appellee Atkins, as the State Committee Chairman, circulated an "Important Notice" to all the delegates on the letterhead of the appellee State Committee which stated: "There is a distinct possibility...that a Party Charter will be held to supersede

state law." He referred to Marchioro v Chaney, 442 US 191,then pending.(Ap. N 10)

Further, if the assertions of the state court, the Supreme Judicial Court, (SJC), about there being a federal right to: (a) make party rules limiting ballot access with which state legislatures cannot interfere and (b) add them to the state statutes by unilateral declaration are examined independently, then it becomes evident that the language of the state statutory scheme for ballot access, as it has existed for over 80 years, is pre-empted under Malone also. The words of the statutes as they have stood for all these years, taken in their plain meaning, absent the extraneous factor of the newly discovered extension of the freedom of association, which is a federal right under the First Amendment, are exclusive.[1.2]

[1.2] n.1 and 2,p.17, and n.3.p.21. If part (b)above is ignored, no authority having been shown for it, then the language in which the legislature wrote the laws is a rule of decision which federal courts must follow by 28 USC 1652. The SJC is interpreting federal law not state law.

There is no independent non-federal ground for the SJC's re-interpretation of the language of the statutes regulating ballot access. The SJC opined that its interpretation was necessary to accomodate part (b) of the appellees' alleged right under the First Amendment. Yet no authority is shown to support such a second part to the freedom of association right claimed. In Democratic Party and Cousins, infra, state statutory language had to give way as invalid before a paramount federal freedom of association right. But there is not in those two cases authority to support the contention that the party may add its private rule to the statutory scheme by declaring the rule to be part of the state statutes, which is what the SJC opined. This is a subterfuge like that in Radio Station WOW,Inc.v Johnson, 326 US 120,129. See Mullaney v Wilbur, supra, at 691 n.11. The legislature made it clear in every way

available to it that it does not want the rule as a law. This is a private power to make public laws (App. F 13). Not in Democratic Party of the U.S. v Wisconsin, 450 US 107 (1981) or any other decision of this Court, even wrenched out of context, (as the SJC did with the language of that case to justify part (a) of the freedom of association claim) are there words to justify this part (b) of the claim.

This part (b) of the SJC assertion should be ignored by federal courts as the subterfuge that it is. In complying with 28 USC 1652 they should read the state statutory scheme absent this distortion produced by the unsupportable claim of accomodation to private authority for the making of unwanted public laws.[1] When

[1] M.G.L.c.53, Sec.2: "candidates...shall be elected, in primaries or caucuses....no candidate shall be nominated...in any other manner than is provided in this chapter...."; Sec. 44: "The nomination of candidates for nomination at state

this is done it can be seen that either the 15 percent rule invalidates the state statutory scheme as clearly intended by the legislature or the private rule is not enforceable by public officials. Both cannot be law simultaneously. Upholding the rule means preempting the state statutory scheme as it has existed since 1894. Appellants therefore have the right of appeal under the rule of Malone. For if there is no right in private political parties to add rules to state statutory schemes, then the SJC went beyond its authority in reinterpreting the otherwise clear and exclusive language of the state statutory scheme to accomodate the claimed private lawmaking authority.[2] The SJC has

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primaries shall be by nomination papers. In the case of...United States senator, nomination papers shall be signed in the aggregate by at least ten thousand voters;" c.54, Sec.41: "Ballots for the use of voters in a voting precinct, polling place or town shall contain the names of all candidates duly nominated for

here sought to obfuscate by questionable semantics that which appellee Atkins

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election therein,..."

[2]The SJC itself has held, when not bending statutory schemes to accomodate such dubious rights, that the statutes as written must be adhered to according to the plain meaning of the words used. Tsongas v Secretary of the Commonwealth, 362 Mass. 708, 713 (1972); School Committee of Springfield v Board of Education, 362 Mass. 417, 431-432 (1972). And this is dictated by a "plain meaning" statute which is particularly significant here: c. 4, Sec. 6: "Rules for Construing Statutes. In General.--In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute....How Words and Phrases Shall be Construed.--Third, Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning." So if the party inner group is a "law-making" body, then its intent is important, in which case the '73 statute is invalidated. If the party inner group is not a "law-making" body, then the intent of the legislature is determinative--and it clearly does not want the rule. Either way, mandatory appeal is in order. The same argument applies to "peculiar and appropriate meaning."

asserted as the intent of the rule in the quote above, that it should supersede state law. The lower courts have, without accurate analysis of their own, deferred to the SJC. A question whether a federal constitutional right invalidates state statutes is not for state courts to decide in a manner that is binding upon federal courts. Federal courts must consider the matter independently, which has not been done. If it were, either the statutory scheme would be invalidated, in the event the first part of the SJC First Amendment claim were upheld, or the first part of the First Amendment claim would be held to be unfounded and a nullity. Since the lower courts have upheld the claim in both parts but have only cited authority for the freedom of association claim (the first part) not for the private lawmaking authority (the second part) it can be seen that plaintiffs are entitled to appeal.

The statutory scheme has been pre-empted but the SJC has attempted to obfuscate this pre-emption. The lower courts have copied the SJC. This avoidance should not be allowed to obscure the pre-emption.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS THAT THE CASE INVOLVES

Art.I, Sec.3, Cl.3 and Sec.4, Cl.1; Amendments I,XIV, and XVII. 42 USC 1983, 28 USC 1652, and 2 USC 431. Mass. Gen. Laws Ann. (Lawyers Co-op Auth. Ed.) Chpts. 3,4,5,281; Chpt. 53 Secs. 2, 34, 41, 44, former secs. 54, 54C and 54D; Chpt. 54, Secs. 28, 41. 1973 Mass. Acts c. 429.

STATEMENT OF THE CASE

The legislature has enacted into law a state statutory scheme for the regulation of primary ballot access for candidates for party nominations for elective office. This statutory scheme relies exclusively[3]

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[3] c. 53, Sec. 34: "Except where vacancies caused by death, withdrawal or physical

upon the collection of a specified number of signatures of registered voters to assure that candidates have a substantial measure of popular support before they may be on the ballot.[4] This is known as the "method of nomination papers" in the statutory scheme.[5] The voter signatures need not be of voters registered at the time of signing as members of the party whose nomination is sought.[6] They can be unenrolled voters but can't be enrolled in a party other than that whose nomination is sought, else the signature will not be certified.[7] At the time of the official statewide primary, held in September of even-numbered years, voters may only vote for the candidates of the party in which they enroll. They may affiliate with a

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disability are filled, no names shall be printed on a ballot other than those presented on nomination papers."

[4] See n. 1, p. 17 above.

[5] id.

[6] id. See also c. 53, Sec. 7

party on the day of the primary if unenrolled. But to change from another party they must do so 28 days before.[8] Primaries are the only way that U.S. senate candidates can be nominated by a party.[9] Candidates must have been in the party whose nomination they seek for 90 days prior to the date of filing of the nomination papers, which, in this case, was the first Tuesday in June. They can't have been enrolled in another party for a year prior to that date.[10] Ten thousand signatures must be obtained by a candidate seeking the office of party nominee for U.S. senator or other statewide office and a lesser number for offices that represent less than the entire geographic extent of

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[7] c. 53, Sec. 46.
[8] c. 53, Secs. 37,38; c. 51, Sec.44
[9] c. 53, Sec. 41: "Primaries shall be held for the nomination of candidates of political parties for all offices to be filled at a state election, except presidential elector."
[10] c. 53, Sec. 48, Sec. 10.

the state.[11]

This method of nomination papers has been the exclusive method of primary ballot access in the state statutory scheme for many, many years[12] and the exclusivity of its language had never been challenged up until the time of the present controversy. It is a carefully crafted scheme in which the legislature has chosen quite explicitly to allow great freedom to the unenrolled to join parties, but restricts party switching by those who stay enrolled in a party to participate in its activities constantly. Thus it can be said to be designed by the legislature to provide a core of more active loyalist members in each party who are bound to the party as voters and candidates but to

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[11] See n. 1 above, p. 17.

[12] The Authorized Mass. Gen. Laws Ann. (Lawyers Co-op.) reveals that most of the sections cited began in 1894 and 1898, at the very beginning of the populist-progressive reform that led to the modern

allow the unenrolled voters to be attracted back and forth between the parties. The legislature did, for a period of time, enact into law an addition to this statutory scheme which provided for an alternative method of ballot access for a single party endorsee for each elective office. This was a statutory delegation of authority to parties to hold pre-primary endorsing conventions to name endorsees.[13] These endorsing conventions had no authority to exclude anyone from the ballot who qualified under the method of nomination papers. For 2/3 of their life they couldn't grant ballot access. In 1973 the legislature terminated this

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primary.

[13] Former section 54 of c. 53 provided for a pre-primary convention that could endorse a single party endorsee for each office and it dated back to St.1932 c.310, but the endorsement did not become a nomination, and thus an alternative method of ballot access until 1953 when former Sec. 54C of c. 53 was enacted along with former section 54D.

experiment by an act which eliminated the sections that had delegated to parties the convention authority.[14]

Several years after the legislature ended the endorsing convention authority, certain leaders of the Democratic Party, though not joined, as it appears, by leaders of the Republican Party, evinced a desire to revive the pre-primary party convention as a device for naming a party endorsee for each office and to strengthen and expand the power of such pre-primary conventions to include authority to bar candidates from ballot access even if they qualified under the method of nomination papers.[15] They formed the 25-man Charter Commission, which held hearings, took evidence, surveyed the rank-and-file, and

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[14] 1973 Mass. Acts. 429, AN ACT REPEALING THE LAW PROVIDING FOR PRE-PRIMARY CONVENTIONS OF POLITICAL PARTIES. Text in Appendix.

[15] For a cursory history of these events as it appeared in the agreed upon statement

then drafted and proposed a Party Charter containing a number of measures designed to "strengthen the party."[16] Prominent among them was the revival of the pre-primary convention with powers expanded to include not only the endorsement of an endorsee but also the limiting of ballot access. To limit access to the ballot, the rule required each candidate other than the endorsee to get 20 percent of the votes of the small number of delegates at

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of facts below, see App. N 1.

[16] In one of the documents from the record below showing the "legislative history" of the 15 percent rule, one that is not reproduced in the appendix, a memo to the Charter Commission from Professor Mileur as Chairman of the Amherst Town Committee, it was stated: "Our mandate directs us to "consider" the question of conventions. Reestablishing Party influence over nominations means returning to something like the old pre-primary endorsement convention, but it is unlikely that we could ressurect it bodily even if we wanted to. Hearings conducted last Spring by the Committee on Party Structure of the State Committee found grassroot Democrats opposed to a return to the old convention system." This does not seem to have given the leadership pause.

the revived convention before being allowed on the ballot to challenge the endorsee at the official primary prescribed by the state statutory scheme.

In 1979 a small number of Democrats[17] held a Charter Convention which considered and adopted the Party Charter proposed by the Charter Commission including the provision for reviving the pre-primary convention and enlarging its powers to include controlling ballot access. The Charter Convention reduced the figure to 15 percent and the provision became known as the 15 Percent Rule. It was at this Charter Convention that appellee Atkins first publicly raised the contention, upon which appellees now principally rely, that a party might have a constitutional right to control ballot access by private

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[17] About .08 percent of the number of enrolled Democrats. The number of delegates who ultimately passed the 15 percent rule at this Convention was about

rule.[18]

After this small group adopted the Party Charter proposed by the Commission, there was no effort to obtain the views of the full membership on the rule. In 1980 the leaders sought to get the rule enacted into law. The bill died in committee as it did again in 1981 along with six other such bills,[19] thus making 8 times that the rule was turned down by the legislature.

In 1981 also the party held its first

.06 of the enrolled membership.

[18] Atkins, as State Committee Chairman, circulated an "Important Notice" (App. N 10) saying that this Court might soon hold that a Party Charter could supersede state law. He referred to Marchioro v Chaney, 442 US 191, then pending. When the case was decided some weeks later the opinion did not support his hopes. To a great degree it went the other way, indicating that the electoral function is a state matter delegated to parties in limited circumstances by statute and subject to the Equality Clause of the XIVth Amendment and other such safeguards surrounding the concept of "one man-one vote."

[19] Sen. No.365 of 1980, Numbers 1980, p. 45S. In 1981, (Page is in official Numbers.) s 390, p. 27S; s 403, p. 28S; s 410, p. 28S; H 1792, p. 120H; H 3343, p.

Issues Convention pursuant to the new Party Charter, which provided for such conventions in odd-numbered, off-election years. At this April Convention, the small number of party members present[20] re-endorsed the concept of the 15 percent rule. Earlier, on February 25, this Court had decided The Democratic Party of the U.S. case, supra. Mr. Atkins did not revive his idea of a party right to unilaterally enforce the rule at the Issues Convention. Later, he agreed to

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219H; H 3566, p. 234H; H 4544. p. 298H.

[20] According to figures agreed upon below there were some 3,250 delegates selected, in turn, in caucuses involving some 30,000 party members. It is agreed upon that the next year, in 1982, there were about 1.3 million registered Democrats. So these figures represent 1/4 of 1 % and less than 3 % of party membership, respectively. Of course, as appellees will be quick to point out, anyone could attend the caucuses who could get off work during the day in business hours, and voting was on the basis of one Democrat attending-one vote, provided you signed your delegate ballot so that the party leaders could see who you voted for under another party rule.

testify that it was at a November meeting of the State Committee in Northampton later in that same year that he first announced the idea publicly that the decision in Democratic Party could make the rule effective without legislation.

Early in the next year, a legislative ally of the rule's proponents introduced a bill to add to Section 44 of Chapter 53 new language that would make it clear that the method of nomination papers remained the method of ballot access despite any party rule.[21] It appeared to be an attempt to reject the rule and confirm the method of nomination papers.[22] It passed and went to the governor for signing. On April 6, the governor sent the Bill to the SJC for an Advisory Opinion under the state's constitutional provision for such

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[21] House No. 5852, introduced by Mr. Serra of Boston.

[22] The text of the bill is in the advisory opinion, In re Opinion of the Justices,

non-precedential, non-law opinions. The governor asked two questions in sending the bill. First he asked if the bill was needed, asking if the state statutory scheme as it existed did not already make the method of nomination papers exclusive regardless of any claim by the party to be able to unilaterally enforce its rule to control ballot access. The second asked if the new bill were signed into law, would it not prevent the rule from being used ?

After 17 days, allowing 10 days for comment, the SJC rendered an advisory opinion. In it they refused to answer the first question because, they said, it would require them to comment upon the underlying state statutory scheme regulating ballot access as it existed prior to the passage of the bill, which, the court said, was forbidden under the advisory opinion procedure. As to the

second question, the court opined that it would interfere with the party's freedom of association under the First Amendment to the United States Constitution as it was explained by this Court in Democratic Party, and Cousins v Wigoda, 419 US 477 (1975) for the legislature to interfere with the operation of the party rule by statutory prescription. But the SJC went beyond just opining that the party had an inherent First Amendment right to regulate candidate selection as part of its internal affairs (like organizing the entertainment) under a somewhat overly stretched reading of certain language in these cases. -Citing no authority for the proposition, the SJC opined an even more novel theory, one theretofore unheard of in constitutional jurisprudence. The party, the SJC opined, had an absolute federal First Amendment right to "add to"

the existing state statutory scheme with its new rule, so that the rule became part of the existing state statutory scheme against the will of the legislature as clearly expressed in every possible way. The existing state statutory scheme, which clearly by its language made the method of nomination papers the sole method of, and requirement for, ballot access, the SJC opined, had to be reinterpreted in the light of this important newfound federal First Amendment right of freedom of association so as to allow this addition of a private rule by a means outside the normal method of lawmaking. Without actually analyzing the language of the statutes that were involved, or even discussing any actual ambiguity in language, the SJC opined that the existing state statutory scheme's language would have to be interpreted to have two

meanings in order to "accomodate" the First Amendment empowered right of the party to add to the statutory scheme by private rules.

On May 21, 1982, the party held its first pre-primary nominating convention under the new 15 percent rule, at which the delegates, 1/4 of 1 percent of the membership,[23] voted for the first time to accept the rule and put it into practice at a convention summoned pursuant to it. In adopting the rule at the convention, its proponents relied upon the SJC advisory opinion without bothering to explain that such opinions are not law. Appellant Hopfmann attended the convention under protest as to its constitutionality and that of the rule. He obtained the

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supra.

[23] Again the convention delegates were elected in workday caucuses, this time involving up to 100,000, or 7.6 % of membership, and again the same national party rule requiring non-private ballots.

votes of 65, or 2% of the delegates. On May 25, Atkins, as the Chairman of the Democratic State Committee, transmitted by letter to Connolly, as the official in charge of ballot access, the names of the convention endorsees and those who had obtained 15 percent of the delegate vote and were, therefore, as Atkins saw it, eligible to challenge the endorsees.

In the case of the party's nomination for "senator in congress," as it is called in the statutory scheme, there were no candidates other than appellant Hopfmann and Edward M. Kennedy, the endorsee. So only Kennedy's name was transmitted by Atkins to Connolly as the endorsee for that office, with no names of challengers meeting the requirements of the rule. On the 28th appellant Hopfmann filed his 10,400 signatures with Secretary of State Connolly, who issued a receipt through his

subordinate but refused to place appellant Hopfmann's name on the ballot for the reason, as he publicly stated, that he had to abide by the advisory opinion of the SJC. Connolly did not publicly explain that advisory opinions are not law.

Connolly also barred other candidates, for the Democratic nomination for the state posts of governor and lt.-governor, from the ballot for the same reasons and issued a public statement about doing so though, curiously, it did not mention appellant Hopfmann and the race for the nomination for Edward Kennedy's incumbent seat. Within a few days appellee Connolly was notified by appellee Bellotti, as the state's highest legal officer, that what he was doing was illegal and unconstitutional, that the advisory opinion of the SJC was not law that he had to follow and that Connolly had no

discretion entrusted to him by the state's laws to bar individuals who had collected and certified their signatures from the ballot. Furthermore, appellee Bellotti informed appellee Connolly that he would not represent him in the matter.[24]

Nonetheless, Connolly persisted in refusing ballot access to appellant Hopfmann and the other candidates similarly situated, who were running for state rather than federal offices. On June 3, 1982, 5 days after being informed that Hopfmann would not be allowed on the ballot, appellants filed the present action in the United States district court in Boston and this litigation ensued.

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was enforced.

[24] Bellotti subsequently intervened, as the Attorney General, in Langone v Connolly, 446 N.E.2d 43, on behalf of Langone as an excluded candidate for state office and against the rule, going all the way up to this Court, where the case missed by one vote, 103 SCt 1510, app'l dsm'd,cert den'd

ARGUMENT

THE LOWER COURTS SEEK SILENTLY TO OVERTHROW THE HOLDING OF THIS COURT IN SMILEY

Upon remand, the circuit court has again refused to face up to the conflict between the unanimous opinion of this Court in Smiley v Holm, supra, and the "right" of private lawmaking which the appellants claim. Upon remand the circuit court has incorporated from Langone v Secretary of the Commonwealth, 388 Mass. 185, 195; 446 N.E.2d 43, 48 (1983) the treatment of "the rule as though it were expressly contained in G.L. c. 53," the state statutory scheme governing election laws. (Supp. App. A-5) If the rule is expressly contained in the state's election laws then it must be an election law itself. How, then, does it comply with Smiley ?

Mr. Chief Justice Hughes' opinion in

Smiley made it clear that Art.I, Sec.4 unequivocally delegates federal authority to the legislature of each state, meaning legislatures as known at the time of the framing of the Constitution and as they are still known in this country today, not to any other part of the state government, and certainly not to the Secretary of State for enforcement of private party rules made by an inner elite as set out in the Statement of the Case. id., 365-367. Moreover, Mr. Chief Justice Hughes made it clear that it means the state legislature acting in discharge of its legislative, law-making function. loc. cit. "[T]he authority is conferred for the purpose of making laws for the State...the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments." Chapters 3 through 5 and 281 of the Mass. Gen. Laws Ann. (Lawyers Co-op Authorized

Edition) set out the method which Massachusetts has prescribed for legislative enactments. Nowhere in them is there anything resembling the authority to enact laws by private action of a political party group that the appellees and the lower courts advocate here.

By not even mentioning Smiley, and by referring to the questions raised by appellants' Art.I, Sec.4 contentions as having been answered by its earlier affirmance of the district court's dismissal of appellants' case, the circuit court made it clear that it would not face directly the overthrow of Smiley which its holding would accomplish if left standing. The district court which it thus silently affirms dealt with the Art.I, Sec.4 claims of appellants by stating that this Court had twice rejected them by single justice action, thus confusing rejection of preliminary extraordinary relief with

disposition on the merits.[25] This is scarcely a facing of the issue.

A similar tactic was adopted by the circuit court in its first decision. It based its rejection of appellants' Art.I, Sec.4 contentions on a "delegation" of power which it suddenly found in the party, a delegation the other side had never argued and one which seems to have a certain ethereal quality since its source and mode of transmission have never been explained or pointed out, though it clearly never came from the legislature by

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[25](App. OB 41) This was preceded by the statement: "No substantive issue remains to be determined." It was followed in turn by the pronouncement: "There is no substantial federal question to be determined and the action is dismissed on its merits." This last, of course, is not so. U.S. senate races are federal matters from start to finish, regulated by exercise of delegated federal constitutional authority and, moreover, appellees' claim here rests ultimately, in its entirety, upon the right of freedom of association which they claim as emanating from the First Amendment to the Constitution of the United States.

a law, and certainly was not in any form that met the rule laid down in Smiley. Now it says the matter has already been disposed of. The fact is that it has not been. The central question remains: Is Smiley being eroded surreptitously by a decision which is in direct conflict with it here, though the courts are being careful not to articulate that conflict ? Jurisdiction should be noted to assure that this does not happen.

AN ADDITIONAL BURDEN UPON BALLOT ACCESS IS EITHER A TIMES, PLACES AND MANNER OR A QUALIFICATION. IF THE PARTY RULE IS THE FIRST, IT FAILS THE SMILEY TEST, IF THE SECOND IT CONFLICTS WITH THE HOLDING OF THIS COURT IN POWELL. EITHER WAY THERE IS A CONFLICT WITH TERRY V. ADAMS.

What is this pre-primary convention that the appellees have created against the expressed desires of their legislature and with no sanction from that body ? Constitutionally it must be either part of the Times, Places and Manner of electing a United States Senator, which must be

prescribed pursuant to Art.I, Sec.4, or it is a Qualification for being a Senator like those set out in Art.I, Sec.3, Cl.3. There is no third alternative for something which is claimed to be part of a state statutory scheme for ballot access. If it is the first, it falls afoul of Smiley and if it is the second it would be a similar attempt to overthrow the holding of this Court in Powell v McCormack, 395 US 486, that the qualifications expressed in the constitutional clause are exclusive and preemptive. Meeting the 15 percent rule's requirements is not set out in the Qualifications Clause itself. Only a constitutional amendment could make it such a qualification. An attempt to have a screening out convention by private authority before the official primary dictated by the state statutory scheme in order to avoid either or both of these constitutional mandates violates and is in

direct conflict with the holding of this Court in Terry v Adams, 345 US 461 (1952). Sanctioning such a scheme conflicts with this Court's holding in that case. For Terry stands for the proposition that any such convention held to restrict ballot access in a way that would otherwise be prohibited by constitutional strictures is illegal. The ruling of the case is not narrowly confined to the avoidance of constitutional strictures against racial discrimination under the XVth Amendment.

VIOLATION OF THE EQUALITY CLAUSE

A political party does not have a unilateral right to make rules limiting primary ballot access for its members seeking its nomination which go beyond the limitations upon ballot access that the legislature has set. A party can only place additional burdens upon ballot access where a legislature, acting in compliance with Smiley, has delegated such

authority, and then the exercise of the delegated authority is limited and subject to safeguards of the First and Fourteenth Amendments, in particular, the doctrine of one man-one vote. Marchioro v Chaney, 442 US 191 (1979). For the conduct of primary elections is a state function, not a private one. Marchioro, supra, Smith v Allwright, 321 US 649 (1944); Storer v Brown, 415 US 724 (1974); Lubin v Panish, 414 US 709 (1974). To upset this established doctrine by letting the lower court decision stand would be a conflict with prior decisions of this Court.

Once a legislature has prescribed Times, Places and Manner of electing, in accord with the mandate of Art.I, Sec.4, candidates are entitled to run in accordance with that prescription without additional features being privately added. And voters are entitled to vote for the candidate of their choice without that

candidate having burdens added that are in addition to those prescribed by the legislature. For a private political party, acting, as here, through a party elite that does not reflect the feelings of the party's full membership, to add an additional requirement is to create a class that is improperly discriminated against in those who do not meet the additional burden thus privately placed and also in those who wish to vote for that candidate so discriminated against without that additional burden. Indeed, all of the party's members who are not part of the inner group that formulates and enforces the rule at the convention are discriminated against by having their franchise diluted, or, as happened here, by being deprived of any choice at the ensuing primary. When, as here, an official or officials of state government, by virtue of the color and authority of

their office, enforce that discrimination as a law, violation of the right of equal protection of the laws guaranteed by the Fourteenth Amendment results. Such discrimination is inviduous per se because it is, by definition, discrimination by the powerful, i.e., political insiders against those whose only source of power, their vote at the primary, is diluted or, in this instance, taken away by the decision made at the convention. Though this Court has addressed the issue of discrimination by the state against minor political parties and independent candidates when the state acts in accordance with Art.I, Sec.4 through its legislature in cases such as Williams v Rhodes, 393 US 23 (1968), and American Party of Texas v White, 415 US 781 (1974), it has not fully addressed the question of insider discrimination against the party rank-and-file in this matter of ballot

access. Nonetheless, in Williams, Mr. Justice Douglas made it clear that: "To force a candidate to rely on write-ins is to burden him with disability. It makes it more difficult for him to get elected, and for the voters to elect him." id, at 37. In the situation of bars to ballot access, the two kinds of rights, of the candidate barred, and of the voters who might vote for the candidate on the ballot, are intertwined. Anderson v Celebrezze, 460 US 780 (1983). As Douglas pointed out in Williams, the Equal Protection Clause bans any "invidious" discrimination," in the electoral process. Harper v Virginia Board of Elections, 383 US 663, 667. id. at 39. The Clause "protects voting rights and political groups (Carrington v Rash, 380 US 89), as well as economic units, racial commmunities, and other entities. When 'fundamental rights and liberties' are at

issue (Harper v Virginia Board, supra, at 670), a State has less leeway in making classifications than when it deals with economic matters." id. at 39. To paraphrase, a State has precious little leeway in making it difficult or impossible for the ordinary members of the party to vote for and to organize campaigns for the candidates of their own choosing among those who have qualified under the state statutory scheme as enacted by the legislature which they elected. loc. cit. Jurisdiction should be noted in order to apply the Court's canon of equal protection cases to this area of the rights of ordinary party voters against insiders trying to dilute or take away their power.

VIOLATIONS OF THE APPELLANTS' RIGHTS OF POLITICAL EXPRESSION AND ASSOCIATION UNDER THE FIRST AMENDMENT

This then affects the appellants First Amendment rights, as made applicable to

the states by the Fourteenth. If the right to vote is thus undermined, the rights of expression and assembly which combine into the First Amendment freedom of political association will also be undermined. A trend toward party elitism will burgeon unchecked if there is not the right of the ordinary voters to raise up candidates from their ranks to defeat leaders who grow remote and unresponsive. Wesberry v Sanders, 376 US 1, 17. Dissident groups, within or without the party, have innumerable times been in the vanguard of democratic thought and have had their ideas ultimately accepted by the majority. The absence of dissident groups within the party, and the loss of the power of the rank-and-file to raise up a candidate against the conventional insider wisdom of the leadership would be a symptom of grave illness in our society. Sweezy v New Hampshire, 354 US 234, 250-

251. The freedom of association, as it applies to groups, protects the entire group or association; it does not enable one inner group to discriminate against others within the group. It is only applicable where the organization, in this case the state Democratic Party, is found to be "the appropriate party to assert these rights, because it and its members are in every practical sense identical." NAACP v Alabama, 357 US 449, 459. Its "aims and interests" must not be "shown to conflict with those of its members and nonmember[s of a similar class.]" NAACP v Button, 371 US 415, 443. In this case the inner group that propounded and enforces the rule has shown that its aims and interests are in controlling candidate selection through the convention. This conflicts directly with the interests of the ordinary members in participating in candidate selection at the primary under

the statutory scheme, and also at the expense of those who are not members at the time of the convention but who may subsequently join before the primary. Harrison v NAACP, 360 US 167, 177. What the organization claiming the right of freedom of association must assert is the "corresponding" right of every single member. NAACP v Button, 371 US 415, 429; Bates v City of Little Rock, 361 USS 516, 523: Louisiana ex rel. Gremillion v NAACP, 366 US 293, 296. A right which belongs to some members over against others is not a freedom of association right because it does not promote political expression and communication. It defeats expression when a minority within a party cuts off full expression of the franchise by the majority in a way that was not wanted by the legislature as necessary for an orderly ballot. The Court should note jurisdiction in order to establish the rights

of association and expression for ordinary voters and non-insider candidates within parties. It is vital to make more explicit the message of the NAACP line of cases that community of interest of all the members of an organization is necessary before it can assert the freedom of association right on behalf of its members. The right should not be used to justify "faction" and factionalism.

THE 15 PERCENT RULE IS AN ATTEMPT TO INSERT POLITICAL PARTIES INTO THE CONSTITUTIONAL FRAMEWORK AGAINST THE INTENT OF THE FRAMERS AND BYPASS THE SYSTEM OF CHECKS AND BALANCES: AS SUCH IT PRESENTS AN IMPORTANT AREA WHERE THIS COURT HAS NOT DEVELOPED PRECEDENT THOUGH IT CLEARLY NEEDS TO.

The establishment of private law-making authority by political parties would bypass the national and state legislatures in the matter of ballot access laws.[26] It

[26] It would be particularly harmful in the one party state where the primary becomes dominant. As the parties agreed below, no Republican has won statewide office in Massachusetts since 1972.

goes directly against the intent of the Framers of the Constitution and would erode the "checks and balances," including those of federalism, upon which our constitutional system is premised. As was pointed out in Smiley, the action of the legislatures in prescribing election laws under Art.I, Sec.4 is the same as that of Congress when it acts under that clause and prescribes election laws that override those of the states, as it did in the Federal Election Campaign Act, 2 U.S. C. 431 et seq. If parties have a First Amendment right to make rules that control ballot access in defiance of the will of state legislatures, then they also have that same right to make rules that control ballot access in defiance of the will of Congress. It is a power that, once established, is unlikely to be voluntarily reduced by those who enjoy its use. Having established it by unilateral

declaration and maintained it with the cooperation of a complaisant judiciary, they are unlikely to not be able to find occasion for its expansion. If private party inner cadres can add to state statutory schemes then they can do the same to those which Congress devises. The Times, Places and Manner Clause provided for the overriding regulation by Congress so that the states might not dissolve the national union. See Madison's comments during the constitutional debates cited in U.S. v Gradwell, 243 US 476, 484. The position of the rule proponents, both appellants and lower courts, inevitably leads to the position that the political parties, acting through their inner cadres at the national and local level, have a First Amendment right to power which the Framers would not grant to the state legislatures without the check and balance of the power of Congress to step in and

regulate by law when necessary. Thus seen in its totality, this is an untenable position. There is no authority to support it that has been cited. Both have indicated that it is up to the appellants to show authority to refute such a contention. There is none, because no one has made such a bold assertion before. The proper focus of this Court is on the departure in jurisprudence that this assertion of the right to make the rule, and the second right to add it to the state statutes, represent. The burden should be on the other side to show that such a private right and authority exist.[27] Any such attempt to show that such a right exists should properly have to show that the specific roadblock which

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[27] "Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application." Lavine v Milne, 424 US 585, 586.

the Framers erected in Art.I, Sec.4, as definitively interpreted in Smiley, is not applicable here and why.[28]

THE RULE IS NOT A STATE STATUTE INTERPRETED BY A STATE COURT; IT IS CLAIMED PURSUANT TO A FEDERAL RIGHT AS FEDERAL LAW BINDING UPON FEDERAL ELECTIONS. THE REPRESENTATION THAT IT IS MERELY STATE LAW IS ERROR THAT IS TOO DANGEROUS TO BE ALLOWED TO STAND

A rule governing ballot access in a federal race, where its proponents claim it is pursuant to a federal constitutional claim, does not lose its character as federal because of a further claim that it can be added to existing state law and

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[28] "The Founding Fathers considered parties divisive and baleful influences. Although they knew that 'factions,' as they called parties, might develop, they hoped that the constitutional arrangements would curtail party influences and make it difficult for them to operate." Edward S. Corwin, J.W. Peltason, Understanding the Constitution, 4th Ed., 1967, p. 49. John Jay, "Address to the People of New York, on the Subject of the Proposed Constitution," 1788, Elliot's Debates, Vol. 1, Journal of the Federal Convention, J.B. Lippincott & Co., Phila. 1896, p. 500. Madison, Letter to Edmund Randolph, 1788, ibid., Vol.V, p. 574. See

incorporated therein by extra-legislative means. Federal canons of statutory interpretation apply but were ignored. There are no independent state grounds. NAACP v Alabama, supra, at 455. There is no "fair or substantial support"for a non-federal ground. Ward v County Commissioners, 253 US 17, 22. The non-federal ground does not "independently and adequately support...the judgment." Abie State Bank v Bryan, 282 US 765, 773. An interpretation of Maine's homicide statute by its highest court has little to do with the case. As was said in Patterson v New York, 432 US 197, 201: "It goes without saying that preventing and dealing with crime is much more the business of States than it is of the Federal Government, Irvine v California, 347 US 128, 134 (1954)." The reliance below upon Mullaney v Wilbur, 421 US 684, 691 (1975), seems

inapposite inasmuch as note 11 on the page cited points out that the exception, even in the case of criminal statutes, is when there is an "obvious subterfuge to evade consideration of a federal issue." This seems to fit here, where an unspecified ambiguity was found without even referring to the statutory language itself in order to accomodate a never before heard of federal right. This appears to have been just to claim the protection of the phrase a "state's highest court interpreting a state statute." As to the error of this kind of interpretation which looks to extraneous factors without examining the language of the statutes: under Massachusetts law, see n. 2, above, p. 18. Under federal canons of statutory interpretation: Caminetti v US, 242 US 470; Bread Political Action Comm.v FEC, 455 US 577; Dawson Chemical Co. v Rohm &

Haas Co., 448 US 176, 187; Consumer Product Safety Comm. v GTE Sylvania, Inc., 447 US 102.[29]

THE SEVENTEENTH AMENDMENT

An election which has additional and more burdensome requirements than those prescribed by a legislature pursuant to Smiley is not "by the people" if the people's say is lessened by private imposition of the more burdensome requirements. Since here only the statewide candidates have to comply with

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Federalist No. 10.

[29]As was said in CPSC, "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." The only contrary "legislative intent" here comes from the rule's proponents, if indeed, they do have the power to privately make laws. There is no "concomitant exegesis of statutory authority." The Court below finds a "delegation" of authority without being able to point to a single statute that empowers it. This lacks "power to pursuade." Adamo Wrecking v U.S., 434 US 275,287, when dealing with law that is delegated federal law.

the rule, the Hopfmann electors had to have attended the convention to get a chance to cast a vote that made a difference. This same qualification was not imposed upon electors of the most numerous branch of the state legislature. If this jaybird convention rule is allowed to stand it will render the Seventeenth Amendment relatively meaningless.

CAPABLE OF REPETITION YET EVADING REVIEW

This case falls under the category of those that are "capable of repetition yet evading review." Williams v Rhodes, supra.

5TH CIRCUIT CASES SHOULD APPLY, NOT 1ST

Here there was a preconceived plan to conduct an unconstitutional election and timely requests for relief, such as ballot placement, were improperly refused by the district court which then took a lot of time for sometimes questionable reasons. Therefore it falls under the 5th Circuit line of cases Hamer v Campbell, Bell v

Southwell, and Brown v Post, supra, which have held that in such a situation it makes no difference that the party seeking the invalidation cannot show that the outcome would have been different but for the acts complained of and not under the case in the First Circuit which is split on that point. Grifin v Burns 579 F2d 1065. There is a split in the circuits compelling review because the 5th Circuite cases were developed in the monumental struggle in the South over the basic and fundamental rights of the franchise and are the only cases applicable to the reality of an assault upon the franchise as brutal as that demonstrated here.

REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AND REQUIRE FULL CONSIDERATION

Unless the case is heard the unanimous decision of this Court in Smiley v Holm, supra, will be overturned in the First Circuit without having been addressed.

Along with it there will be a serious erosion of the constitutional scheme for controlling party and "faction," the Times, Places and Manner Clause which Smiley interprets, and the Qualifications Clauses, which are interpreted by Powell.

If this case is not heard, a major shift in the federal system will occur with political parties free to challenge legislatures for control of laws governing ballot access. The control upon party and faction which the Framers created will have been eroded by a fait accompli.

A dangerous trend will have been established which converts the First Amendment freedom of association from a shield protecting all the members of an organization as a unified body, to a sword used by "factions" within organizations to accumulate power at the expense of their fellow members -- of the franchise or power of other sorts. What will be

established is a federal constitutional right to make internal "laws" overriding rights of individuals within organizations in a manner protected from meaningful judicial review.

The most radical part of the existing lower court opinions is the sanctioning of the power in political parties to actually make laws, in the form of private rules that are not subject to the constituent bargaining process of legislatures, and then to add those laws to state statutory schemes, even when they are not desired by the legislators. This power will only expand if not checked and will be as paramount over the wishes of Congress as it has so far been over the desires of the legislators of Massachusetts. Thus the federal system of checks and balances in the Constitution would be seriously compromised.

Respectfully Submitted,

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CERTIFICATE OF SERVICE UNDER RULE 28

I hereby certify that I am a member of the bar of this Court, and that I have served, by United States mail, first class, postage prepaid, this 23rd day of December, 1985, true and accurate copies of this Jurisdictional Statement upon Alexander Gray, Jr., Esq., Assistant Attorney General, One Ashburton Place, Room 2001, Boston, Mass. 02108, counsel of record below for defendants-appellees Secretary of State Connolly and Attorney-General Bellotti, 3 copies for each defendant, and on Keith Long, Esquire, Herrick and Smith, 100 Federal Street, Boston, Mass., 02110, counsel of record below for defendants-appellees Chester G. Atkins and the Democratic State Committee of Massachusetts, 3 copies for each defendant.

_____

85-1094

Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

ALWIN E. HOPFMANN, GREGORY HESSION, CLARENCE PERKINS, CLARENCE PAULIN, and BETH SULLIVAN,

Appellants,

v.

MICHAEL JOSEPH CONNOLLY, FRANCIS X. BELLOTTI, CHESTER G. ATKINS, and the DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Jurisdictional Statement

Appendix

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EDITOR'S NOTE

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UNITED STATES COURT OF APPEALS
For the First Circuit

No. 84-1317

ALWIN E. HOPFMANN, ET AL.,

Plaintiffs, appellants,

v.

MICHAEL JOSEPH CONNOLLY, ET AL.,

Defendants, Appellees.

ON REMAND FROM THE
UNITED STATES SUPREME COURT

Before

Campbell, Chief Judge,

Cowen,* Senior Circuit Judge,

and Bownes, Circuit Judge.

Lawrence J. Ball and Laurence E. Elgin on brief for appellants.

Francis X. Bbellotti, Attorney General and Alexander G. Gray, Jr., Assistant Attorney General, Chief, Elections Division, on brief for appellees, Michael Joseph Connolly, Secretary of State and Francis X. Bellotti, Attorney General.

James Roosevelt, Jr., and James H. Wexler,

Keith C. Long, and Herrick & Smith on brief for appellees, Chester G. Atkins and The Democratic State Committee of Massachusetts.

July 31, 1985

---

* Of the Federal Circuit, sitting by designation.

COWEN, Senior Circuit Judge.

In Hopfmann v. Connolly, ____ U.S. ____, 105 S.Ct. 2106 (1985), the United States Supreme Court vacated in part and remanded our decision, which is reported in 746 F.2d 97 (1st Cir. 1984). In that decision, we had held that the enforcement by the Commonwealth of Massachusetts of its Democratic Parfty's so-called "15 percent rule," which limits ballot access in the state primary to candidates who receive 15 percent or more of the vote in the party's

convention, did not violate the United States Constitution. In rejecting one of appellants' contentions, that the rule violated the First and fourteenth Amendments to the Constitution, we relied on the Supreme Court's summary dismissal of an earlier appeal from a decision of the Supreme Judicial Court of Massachusetts, Langone v. Connolly, 460 U.S. 1057 (1983). The Supreme Court vacated our decision to the extent that we relied on its summary di8smissal in Langone, and held that this dismissal had no precedential effect.

Therefore, the sole question before us on remand is whether the enforcement by Massachusetts of its Democratic Party's 15 percent rule, which denied appellant Hopfmann access to the ballot in the 1982 Democratic primary for U.S. Senator, violated the First or Fourteenth Amendments. Appellants content that the state's encorcement of this rule violates their

rights to freedom of association and equal protection guaranteed by these amendments. As we understand their brief, they do not maintain as the plaintiffs in the Langone case apparently argued before the Massachusetts courts, that Massachusetts statutes per se bar the state from enforcing the 15 percent rule.[1]

Moreover, even if such a contention were before us, the Supreme Judicial Court of Massachusetts has construed the state's statutory ballot access requirements in Langone to encompass, rather than to exclude, the Democratic Party's 15 percent rule.

For the purpose of evaluating the

---

[1] Appellants argue here that Massachusetts has not statutorily delegated its constitutional authority to conduct Senatorial elections to any political party. This argument was apparently made only as the basis for their contention, disposed of in our earlier decision, that the 15 percent rule violates the "time, place and manner" provisions of Article I, Section 4 of the Constitution. See 746 F.2d at 101-102.

> plaintiffs' claims that the 15% rule violated rights guaranteed to them by the Federal and State Constitutions, we treat the rule as though it were expressly contained in G.L. c. 53.

Langone v. Secretary of the Commonwealth, 388 Mass. 185, 195; 446 N.E.2d 43, 48 (1983). We are bound to follow this interpretation of state law by the state's highest court, absent extreme circumstances not present in this case. Mullaney v. Wilbur, 421 U.S. 684, 691 (1975).

A challenge to the validity of the 15 percent rule on First and fourteenth Amendment grounds was also exhaustively refuted by the Supreme Judicial Court of Massachusetts in Langone, 446 N.E. 2d at 48-51. Like the district court below, we agree with the analysis of this issue by the Massachusetts court, and do not consider it necessary to repeat that court's discussion at length. Both the rationale and the result reached in Langone are amply supported by the decisions of the

United States Supreme Court, which are cited therein. It suffices to say that the 15 percent rule's infringement of appellants' rights to associate and express political ideas, as well as their right to equal protection of the laws, is not substantial. For example, the rule does not discriminate against any class of candidates or voters, and does not disqualify any candidates from appearing on the general election ballot. Cf. Bullock v. Carter, 405 U.S. 134, 142-44 (1972); Jenness v. Fortson, 403 U.S. 431, 438-42 (1971). Moreover, the 15 percent rule promotes the legitimate and important state interest of "prevent[ing] the clogging of its election machinery, avoid[ing] voter confusion, and assur[ing] that the winner si the choice of a majority, or at least a large plurality, of those voting, * * * ." Storer v. Brown, 415 U.S. 724 (1974); Bullock v. Carter, 405 U.S. at 145.

Pursuant to the standards which have been utilized by the Supreme Court in ballot access cases, it becomes apparent that the 15 percent rule does not "unfairly or unnecessarily burden[] the availability of political opportunity." Anderson v. Celebrezze, 460 U.S. 780, 793 (1983). therefore, we hold that appellants' contention that the 15 percent rule violates the First and Fourteenth Amendments is without merit.

The remand does not require and we find no reason for reviewing or disturbing the remainder of our previous decision. Accordingly, the judgment of the district court dismissing appellants' claims is again affirmed.

AFFIRMED.

ORDER BELOW RE-AFFIRMING DISMISSAL OF DISTRICT COURT ON REMAND

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 84-1317

ALWIN E. HOPFMANN, ET AL.,

Plaintiffs, Appellants,

v.

MICHAEL JOSEPH CONNOLLY, ET AL.,

Defendants, Appellees.

JUDGMENT

Entered: July 31, 1985

This cause was remanded from the Supreme Court of the United States and was submitted on briefs.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court dismissing appellants claims is again affirmed.

By the Court:

Francis P. Scigliano

Clerk.

By: Richard W. Gordon

Chief Deputy

Clerk.

[cc: Mssrs. Ball, Bellotti and Roosevelt]

ORDER BELOW DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 84-1317

ALWIN E. HOPFMANN, ET AL.,

Plaintiffs, Appellants,

v.

MICHAEL JOSEPH CONNOLLY, ET AL.,

Defendants, Appellees.

BEFORE

CAMPBELL, Chief Judge,

COWEN,*Senior Circuit Judge,

COFFIN, BOWNES, BREYER AND TORRUELA,

Circuit Judges.

ORDER OF COURT

Entered: September 23, 1985

The panel of judges that rendered the decision in this case having voted to deny

the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the suggestion for rehearing en banc be hereby denied.

By the Court:

Francis P. Scigliano

Clerk.

---

*Of the Federal Circuit, sitting by designation.

[cc: Mssrs. Ball, Bellotti and Roosevelt]

App. CC-2

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ALWIN E. HOPFMANN, ET AL,

Plaintiffs,

v. CIVIL ACTION NO. 82-1530-MC

CIVIL ACTION NO. 84-393-MC

MICHAEL JOSEPH CONNOLLY, ET ALS,

Defendants.

MEMORANDUM AND ORDERS DISMISSING COMPLAINTS

OB 35

McNAUGHT, D. J.

In his complaint in 1982 Mr. Hopfmann,who sought to be a candidate in the Democratic primary for United States Senator, but was excluded from the ballot for failure to obtain the 15 percent of the votes cast at the Democratic Party Convention, attacked the validity of the the "15% Rule" for the first time. (The Rule requires that if a person is to run in a party primary, he or she must have received 15% of the votes on any ballot at the Convention endorsing the candidates.) His was not the only challenge to the

Rule. Frederick C. Langone brought an action in the courts of the Commonwealth of Massachusetts. Eventually the Supreme Judicial Court held that the 15 Percent Rule was not excluded by Chapter 53 of the Masachusetts General Laws; that the statute accommodated the Rule and that the Rule was not constitutionally invalid. Appeals were taken to the Supreme Court of the United States. Those were dismissed for want of jurisdiciton. Certiorari petitions were denied.

At the hearing on the issuance of a preliminary injunction on the 1984 complaint (in February of this year), the parties agreed that the matters submitted to the three-judge court on the 1982

complaint are no longer pending. They have been resolved. Defendants contend that no substantive issues remain for resolution by me as the single judge assigned to the action. Plaintiffs disagree. In early 1983, I asked that a statement of issues (for the single judge) be submitted by plaintiffs . It was filed February 9, 1984.

Motions to dismiss both actions (treated now as motions for summary judgemetn) were taken under advisement, once the parties had an opportunity to submit written arguments and briefs. After deliberation I conclude and rule that judgment for defendants must be entered in both cases.

With respect ot the civil Action No. 82-1530=MC, I am in agreement with the decision of the Supreme Judicial Court upholding the Rule's validity, and for the reasons expressed therein. Extensive repetition of those reasons is unnecessary. See Langone v. Secretary of the Commonwealth, 446 N.E.2d 43 (Mass. 1982f). The analysis of the right to associate with a political party, protected by the First and Fourth Amendment ot the United States Constitution, the interest of a party in ensuring that its members will have an effective role in deciding who will appear as a party's candidate, the fundamental right of association in a political party

and the integrity of the election process are all discussed as factors which do not require preclusion of the Rule as obstacles, but provide foundations for it. The Supreme Judicial Court cited Democratic Party of United States v. Wisconsin, 450 U.S. 1007 (1981) as authority for the proposition that the Rule requiring a modicum of support from members with substantial affiliation with the party is one mode of assuring freedom of association--association with the ability to limit control of its decisons to those sharing its interests. It was said, (and properly), that although the Rule has some impact on voters' rights and those of candidates, access to the ballot

was not denied unfairly.

Plaintiffs' claims were rejected by the Supreme Court (April 4, 1983). Appeals were dismissed and certiorari denied. No substantive issue remains to be determined. Plaintiffs' Article I, Sec. 4 claims have been rejected twice by a Single Justice of the Supreme Court. There is no substantial federal question to be determined and the action is dismissed on its merits.

The complaint in civil Action No. 84-393 was filed February 10, 1984. In a statement of reasons for denial of a preliminary injunction filed February 21 of this year, I wrote:

As stated hereinbefore, the plaintiff

in the second action does not concede the validity of the 15 Percent Rule. Indeed, it is specificallky averred in Paragraph XXXV that the "15 Percent Rule is an unconstitutional act", and elections thereby affected are "void" and a new special election should be held. Mr. Hopfmann, as a would-be candidate for the office of United States Senator from the Commonwealth of Massachusetts and as a voter, asserts that if the Rule is not invalid, it should be applied to all candidates for the office of President of the United States and for the office of United States Senator from Massachusetts; that it

should be applied not only to Democrats but to Republicans as well; that all persons who are candidates or "who have announced that they are thinking" of becoming candidates for the office of President of the United States or the United States Senate should be enjoined "until they comply with the 15 Percent Rule of the Democratic Party" from participating in any primary. He would have this Court enjoin the Secretary of the Commonwealth and the Director of Elections to remove all names from the presidential primary ballot in March, and to order the Republican State Committee also to enforce the

"15 Percent Rule".

If Mr. Hopfmann is denied preliminary relief and the 15 Percent Rule remains in effect, the rule will be applied to him and to all other potential candidates at the Democratic party's primary convention, scheduled to be held in June in the Commonwealth of Massachusetts. Should he fail to meet the requirements of the 15 Percent Rule, the Secretary of the Commonwealth will not allow his name to appear upon the printed primary ballot. Mr. Hopfmann will have suffered harm at that time. On the other hand, if an injunction as

> requested in this action is granted, the campaigns of all candidates for the presidency will be disrupted, as well as the campaigns of all candidates for the United States Senate from Massachusetts (Democrat and Republican alike). The public interest in orderly timely elections will be disrupted as well. A balance of these factors militates against the issuance of an injunction.

The reasons that I gave at that time for the conclusion that the plaintiffs had not shown a likelihood of success on the merits afer further study, provide the basis for the conclusion that the judgment must enter in favor of the defendants.

His contention that the 15 Percent Rule is invalid has been testedinthe past, and found wanting. It has been the subject of adverse opinion by the Supreme Judicial Court of Massachusetts, and the Supreme court of the United States thereafter dismissed appeals and denied certiorari. On two other occasions, single justices of the Supreme Court of the United States have failed to find merit in his claims. Secondly, he asks to have a rule of the State Democratic Committee applied to persons seeking the Republican nomination. There will be no Republican nominating

convention in Massachusetts in 1984. Neither the State nor this Court can enforce a Democratic 15 Percent Rule upon the Republican party. Thirdly, Mr. Hopfmann seeks to have the 15 Percent Rule of the Democratic Party applied to candidates for the presidency. The presidency is an office of nation-wide scope. It is not a state-wide office as Mr. Hopfmann clailms. Finally, as we were reminded in argument, the purpose of the presidential primaries in the Commonwealth of Massachusetts is not to provide party nominees, but establishes the proportionality of the Massachusetts

delegations to the nominating conventions.

Plaintiffs, other than Mr. Hopfmann, have no standing to bring this action. He, at least, was a potential candidate for office. The others cannot claim that the Rule is applied against them at all. They have no personal involvement, and appear to be seeking an opinionfrom this Court of an advisory nature only, for the possible benefit of others. United Public Workers of America v. Mitchell, 330 U.S. 75 (1947) requires the conclusion of lack of standing on their part. Indeed, there is even qustion pertaining to the standing of Mr. Hopfmann. Even assuming standing, the complant must be and is hereby

dismissed.

[signature]

JOHN J. McNAUGHT

UNITED STATES DISTRICT

JUDGE

April 9, 1984

OB 49

App. F-1

OPINION OF THE JUSTICES TO THE GOVERNOR, Supreme Judicial Court of Massachusetts. April 23, 1982. 385 Mass. 1201.

A question was propounded by the Governor of the Commonwealth of Massachusetts to the Justices of the Supreme Judicial Court with respect to the nomination of party candidates for placement on the state primary ballot. The Justices of the Supreme Judicial Court, gave answer that proposed mandatory statute providing that "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination of the state primary" would abridge the constitutional rights of the party and its members to

associate while allowing candidates to be placed on the state primary ballot in contravention of the party's charter.

Question answered.

On April 23, 1982, the Justices submitted the following answers to questions propounded to them by the Governor.

To His Excellency, the Governor of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully respond to the questions set forth in the Governor's request dated April 5, 1982, and transmitted to the Justices on April 6, 1982.

General Laws c. 53, § 44, as amended through St. 1981, c. 278, § 1, provides in part that "(t)he nomination of candidates for nomination at State primaries shall be by nomination papers." There is pending before the Governor for his approval

House Bill No. 5852, which would amend c.53, § 44, by inserting after the first sentence the following sentence: "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination at the state primary." Article Six, Section III, of the charter of the Democratic party of the Commonwealth of Massachusetts, provides "There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the

proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election."

Stating his uncertainty "as to the necessity or constitutionality of H.5852 if enacted into law," the Governor requests, pursuant to the authority contained in Pt. II, c.3, art. 2, of the Massachusetts Constitution, as amended by art. 85 of the Articles of Amendment, the opinion of this court on the following questions of law:

> "1. Does the fifteen percent rule in the Democratic Charter supersede the current provisions of General Law, Chapter 53, Section 44, or can a candidate be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of

the vote at the party convention?

"2. Would enactment of H.5852 allow a candidate to be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?"

The constitutional provision which empowers us to answer questions propounded by the Governor, the Council, and the Legislature, restricts our authority to "important questions of law" and to "solemn occasions." Part II, c. 1, § 1, art. 2 of the Massachusetts Constitution. To preserve the principle of separation of powers, fundamental in our system of government, we are bound strictly to observe these constitutional limitations. Answer of the Justices, 362 Mass. 914, 916-917, 291 N.E. 2d 598 (1973). As the Justices have ad-

vised, "By a solemn occasion the Constitution means some serious and unusual exigency. It has been held to be such an exigency when the Governor or either branch of the Legislature having some action in view has serious doubt as to their power and authority to take such action, under the Constitution, or under existing statutes." Answer of the Justices, 373 Mass. 867, 871, 366 N.E. 2d 730 (1977), quoting from Answer of the Justices, 148 Mass. 623,625-626, 21 N.E. 439 (1889).

(1) Because question number 1 inquires only about the legal effect of the current statute in light of the Democratic party charter, and not about the Governor's authority to take action, there is no solemn occasion authorizing us to answer. Opinion of the Justices, ___ Mass. ___, ___ _ ___, Mass.Adv. Sh.

(1981) 1361, 1381-1382, 424 N.E. 2d 1092. It may well be that the Justices' answer to question number 1 would help the Governor determine the "necessity" of House No. 5852 in view of the present statute, a concern expressed in the request. However, whether the bill is necessary raises the question whether it is wise or expedient for the Governor to approve the bill. The Justices are not empowered to answer questions bearing on the wisdom or expediency of proposed legislation. Answer of the Justices, 319 Mass. 731, 734, 66 N.E. 2d 358 (1946). Opinion of the Justices, 314 Mass 767, 771-772, 49 N.E. 2d 252 (1943). Not having the authority to answer question number 1, we respectfully request that we be excused from answering it.

In the context of the Governor's expressed uncertainty as to the constitutionality of House No. 5852, we interpret question number 2 to inquire whether, if House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the Democratic State primary ballot in contravention of the party's charter. The Governor has a present duty to act on House No. 5852. Part II, c. 1 § 1, art. 2, of the Massachusetts Constitution. This duty, and the Governor's expressed doubt about whether House No. 5852 would be constitutional if he approved it, present a solemn occasion requiring our answer to the second question. See Opinion of the Justices, 314 Mass. 767, 772, 49 N.E. 2d

252 (1943).

"The (Democratic Party of the Commonwealth) and its adherents enjoy a constitutionally protected right of political association. 'There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments ... . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.' Kusper v. Pontikes, 414 U.S. 51, 56-57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973). 'And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.' Williams v.

Rhodes, 393 U.S. 23, 30-31, 89 S.Ct. 5, 10-11, 21 L.Ed. 2d 24 (1968). Moreover, '(a)ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1211, 1 L.Ed.2d 1311 (1957); see NAACP v. Button, 371 U.S. 415, 431, 83 S. Ct. 328, 337, 9 L.Ed.2d 405 (1963)." Cousins v.Wigoda, 419 U.S. 477, 487-488, 95 S.Ct. 541, 547, 42 L.Ed.2d 595 (1975). "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 122n22, 101 S.Ct. 1010, 1019, 67 L.Ed.2d 82 (1981), quoting L. Tribe, American Constitutional Law 791

(1978). A determination of who will appear on a general election ballot as the candidate endorsed by an identified political party is a critical decision for that party. The party, therefore, has a substantial interest, implicit in its freedom of association, to ensure that party members have an effective role in that decision. Democratic Party of U.S. v. Wisconsin, supra.

Within the Commonwealth, the winner by a plurality of a party primary becomes that party's candidate for statewide office in the general election. G.L. c 53, § 2. Voting in party primaries is limited to enrolled party members and unenrolled voters who enroll at the polls just before receiving ballots. G.L. c. 53, § 37. Apart from Article Six, Section III, of the State Democratic party charter, in order to be placed on a party's primary

ballot, a candidate for statewide office must be an enrolled member of that party, G.L. c. 53, § 48, and submit nominating papers signed by at least 10,000 registered voters, c. 53, § 44, who may be enrolled in that party or unenrolled. G.L. c. 53, § 46. Therefore, apart from Article Six, section III, of the State Democratic party charter, a candidate for statewide election could be placed on the Democratic party ballot and win the primary, thus becoming entitled to be placed on the general election ballot as the Democratic party candidate, with little or no support from the regular party membership.[1/]

1/ As of February, 1980, 39.9% of all registered voters in the Commonwealth were unenrolled. Bachrach v. Secretary of the Commonwealth, ___ Mass. ___, ____, Mass.Adv.Sh.(1981) at 97 415 N.E.2d 832.

The State Democratic party charter, Article Six, Section III, proviso that any nominee who receives at least 15% of the vote at the State convention may challenge the convention endorsement, by negative implication adds to the statutory requirement of nomination papers for placement on the primary ballot the further requirement that a candidate must receive at least fifteen percent of the convention vote. This has the double effect of limiting the number of candidates on the primary ballot, thereby eliminating the confusion that may result from too many candidates, and of limiting the candidates to those with significant party support, thereby giving the party members an effective role in choosing the party's candidate in the general election. The State has been held to have a compelling

interest in limiting the number of candidates in order to prevent voter confusion. American Party of Texas v. White, 415 U.S. 767, 780-781, 94 S.Ct. 1296, 1305-06, 39 L.Ed.2d 744 (1974). Storer v. Brown, 415 U.S. 724, 732, 94 S.Ct. 1274, 1280, 39 L.Ed. 2d 714 (1974). A political party has a parallel interest.

If House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would appear to override the charter requirement of 15% of the convention vote for placement on the primary ballot and, together with c. 53, § 46, would eliminate the Democratic party's control of who its candidate in the general election would be. This would substantially infringe the right of freedom of association of the Democratic party and its members, and therefore, to pass constitutional

muster, it must serve a compelling State interest, Sears v. Secretary of the Commonwealth, 369 Mass. 392, 397, 341 N.E. 2d 264 (1975), and do so with as little infringement on constitutional rights as possible. See Riddell v. National Democratic Party, 508 F.2d 770, 776-778 (5th Cir. 1975). We must apply "strict scrutiny" to its justification and operation. Bachrach v. Secretary of the Commonwealth, ___ Mass. ___, ___, Mass.Adv.Sh. (1981) 93, 101, 415 N.E.2d 832.

The Commonwealth unquestionably has a compelling interest in the overall regularity of the election process, including limitation of the number of candidates on the ballot so as to avoid voter confusion and ensuring that the candidates whose names appear on the ballot have significant community support.

American Party of Texas v. White, 415 U.S. 767, 782, 94 S.Ct. 1296, 1306, 39 L.Ed.2d 744 (1974). This applies to the conduct of primary elections, Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973), Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d L (1973), which are an important part of the procedure by which the ultimate office holder is chosen. Sears v. Secretary of the Commonwealth, supra, 369 Mass. at 398, 341 N.E.2d 264. These interests are served by the requirement that each candidate for statewide office obtain the signatures of at least 10,000 registered voters on nomination papers, G.L. c. 53, § 44, but they are not served by the elimination of a 15% convention vote requirement for placement on the primary ballot. Elimination of the Democratic party charter

requirement could only increase the number of candidates on the primary ballot, with a resulting increased potential for voter confusion.

We assume that House No. 5852 was designed to promote the integrity of the election process. Nevertheless, the Commonwealth's compelling interest in the integrity of the election process does not constitutionally justify elimination of party control over who the party's candidate in the general election will be. This view finds support in Democratic Party of U.S. v. Wisconsin, supra. In that case, the United States Supreme Court struck down a State statute that compelled the party to seat delegates at its national convention who were bound by the statute to vote on the first ballot with the results of a primary election in which any

registered voter could participate regardless of party affiliation. This was contrary to the national party rules. Wisconsin impermissibly attempted to override the national party's attempt to limit "those who could participate in the processes leading to the selection of delegates to their National Convention." Id. 450 U.S. at 122, 101 S.Ct. at 1019. General Laws c. 53, § 44, as it would be amended by House No. 5852, would attempt to override the State Democratic party's effort to ensure that regular party members have a substantial voice in the selection of its candidates for statewide office, and that, at least in conjunction with §§ 44, 46, and 37 of G.L. c. 53, is impermissible. If the law of the Commonwealth were to require that nomination papers be signed only by regular members

of the party, contrary to c. 53, § 46, or that only regular members of the party may vote in the primary, contrary to c. 53, § 44, as it would be amended by House No. 5852, would be less intrusive on a political party's constitutional rights. However, we express no opinion on whether it would be sufficiently less intrusive to be constitutionally sound, since that is not the question before us, nor need we consider whether any proviso of the Constitution of the Commonwealth might prohibit the proposed enactment.

(2) We answer question number 2, as interpreted by us above, as follows: If House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the

Democratic State primary ballot in contravention of the party's charter.

The foregoing opinion is submitted by the Chief Justice and the Associate Justices subscribing hereto on the 23rd day of April, 1982.

EDWARD F. HENNESSEY

HERBERT P. WILKINS

PAUL J. LIACOS

RUTH I. ABRAMS

JOSEPH R. NOLAN

NEIL L. LYNCH

FRANCIS P. O'CONNOR

CONSTITUTIONAL AND STATUTORY PROVISIONS:

A. CONSTITUTIONAL PROVISIONS

Art. I, Sec. 3, Cl. 3:

No Person shall be a Senator who shall not have attained the Age of thirty years, *and been nine* Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

Art. I, Sec. 4, Cl. 1:

The Times Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators.

First Amendment:

Congress shall make no law...abridging the freedom of speech,...or of the right of the people peacably to assemble, and to petition the government for a redress of grievances.

XIVth Amendment:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any personwithin its jurisdiction the equal protection of the laws.

XVIIth Amendment:

The Senate of the United States shall be composed of Two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

CONSTAT 3

STATUTES:

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory, subjects, or causes to be subjected, any citizen of the United States or other person withn the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. 1652:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

2 U.S.C. 431(1):

The term "election" means--

***

(B) a convention ..of a political party which has authority to nominate a candidate.

2 U.S.C. 431(2):

The term "candidate" means an individual who seeks nomination for election...to Federal office...

2 U.S.C. 431 (3)

The term "Federal office" means the office of Senator ...in Congress..."

Mass. Acts 1973 c. 429:

Chap. 429 AN ACT REPEALING THE LAW PROVIDING FOR PRE-PRIMARY CONVENTIONS OF POLITICAL PARTIES.

Be it enacted, etc., as follows:

....

Secs. 1 through 3 of the 1973 Act are omitted as they remove peripheral references from the General Laws and are in the Appendix, Vol. 3, Supplementary, filed in 84-1440. Section 4 below removed the actual enabling sections. The next page is CONSTAT 17

SECTION 4. Section 44 of said chapter 53 is hereby amended by striking out the first and second sentences and inserting in place thereof the following two sentences:--

The nomination of candidates for nomination at state primaries shall be by nomination papers. In the case of offices to be filled by all the voters of the commonweath[sic], nomination papers shall be signed in the aggregate by at least ten thousand voters.

SECTION 5. Sections fifty-four, fifty-four C and fifty-four D of said chapter fifty-three are hereby repealed.

(This bill, returned by the Governor, to the House of Representatives, the

branch in which it had originated, with his objections thereto, was passed by the House of Representatives, June 19, 1973, and, in concurrence, by the Senate, June 19, 1973, the objections of the Governor notwithstanding, in the manner prescribed by the Constitution; and thereby has "the force of a law".)

Mass. Gen. Laws, Chapts. 53, 54,
Method of Nomination Papers:

Mass. Gen. Laws, Chapt. 53, Sec. 2:

...candidates of political parties for all elective offices,...shall be elected, in primaries or caucuses,...All nominations and elections in primaries and

caucuses shall be by direct plurality vote. No candidates shall be nominated, and no member of a political committee or coonvention delegate elected, in any other manner than is provided in this chapter....

Mass. Gen. Laws, Chapt. 53. Sec. 34:

Except where vacancies caused by death, withdrawal or physical disability are filled, no names shall be printed on a ballot other than those presented on nomination papers.

Mass. Gen Laws, Chapt. 53, Sec. 44:

The nomination of candidates for nomination at state primaries shall be by nomination papers. In the case of...United States senator, nomination

papers shall be signed in the aggregate by at least ten thousand voters;

Mass. Gen. Laws, Chapt.54, Sec. 41:

Ballots for the use of voters in a voting precinct, polling place or town shall contain the names of all candidates duly nominated for election therein,...

Place of "Chusing" of United States senators:

Mass. Gen. Laws, Chapt.53, Sec. 28:

State primaries shall be held on the seventh Tuesday preceding biennial state elections....

***

Except in Boston, primaries shall be held wholly or partly by wards, precincts

or towns, as the aldermen or selectmen may designate.

Mass. Gen. Laws, Chapt. 54, Sec. 24:

The aldermen in cities, except where city charters provide otherwise, and the selectmen of towns divided into voting precincts, shall, twenty days at least before the biennial state...election..., designate the polling place for each voting precinct and cause it to be suitably fitted up and prepared therefor.

Primaries mandated:

Chapter 53:

Section 41. Primaries shall be held for the nomination of candidates of political parties for all offices to be filled at a state election, except presidential elector. Sections forty-two to fifty-three A, inclusive, shall apply to such primaries.

[Former sections, now repealed, that authorized party pre-primary conventions]:

Chapter 53:

[Former Section 54]:

[PROVISIONS APPLYING TO PRE-PRIMARY CONVENTIONS

Caption amended St.1932, c.310, Sec.21,c.346,Sec.2,st.1953,c.406,Sec.7

Sec. 54. State conventions of political parties. Beginning in the year nineteen hundred and fifty-four, a political party shall, upon the call of its state committee, but not later than June twentieth and not earlier than June fifth, in a year in which a biennial state

elections is held, hold a state convention for the purpose of adopting a platform, electing such number of members at large of the state committee as may be fixed by the convention, and endorsing for nomination candidates for the offices to be filled by all the voters of the commonwealth, to be voted for at the ensuing state primary, and for such other purposes consistent with law as the convention may determine. Such convention shall consist of delegates chosen by the ward and town committees. The number of delegates shall be one from each ward and town and one additional for every one thousand votes or major fraction thereof cast at the preceding biennial state election, in such ward or town, for the respective party's candidate for governor. Each such ward or town committeee desiring representation at such conventio shall, within fourteen days after a meeting duly

called for the pur- pose of selecting a delegate or delegates, notify the respective city committee, in the case of a city, or the state committee, in the case of a town, but in no case shall such notice be given less than fourteen days prior to the date appointed for the opening of such convention. No vacancy shall be filled for any reason. Nothing herein contained shall affect or diminish the operation of the laws relating to state primaries contained in sections forty-one to fifty-three, inclusive. As amended St.1932,c.310, Sec. 21;St.1935, c.482,Sec.1; St.1936, c.11,Sec.1; St.1937, c.24,Sc.3; St.1938, c.346,Sec.2;St.1941, c.337,Sec.11;St.1953, c.406,Sec.7;St.1955, c.138,Sec.4;St1957,c.278,Sec.2.]

[Former Sec. 54C]

[Sec. 54C. Certificates of nomination of candidates endorsed by state

Every certificate of nomination of candidates endorsed for nomination by a state convention shall state that the nomineee has been endorsed for nomination at such convention and shall include such facts as are required by section eight. such certificates shall be signed, sworn to and filed as required by section five.

Each such candidate shall, within ten days from the day when the convention terminates, file with the state secretary his written acceptance of the nomination, otherwise his name shall not be printed on the ballot as a candidate for the office to which he was nominated, and he may add the eight-word statement authorized by section forty-five. such candidate may not withdraw such acceptance. Added St.1953,c.406,Sec.8.]

[Former Sec. 54D]

[Sec. 54D. Pre-primary conventions; procedure; officers; penalties. Delegates

shall be seated in groups by senatorial districts as determined by the state committee. The convention shall be called to order by the chairman or acting chairman of the state committee, or in the absence of either, then by a person designated in such manner as the rules of the party shall prescribe. The person who calls the convention to order shall preside until the election of a permanent chairman. He shall appoint a temporary secretary to receive the roll of the convention and a monitor from each group who shall receive the credentials of delegates and present them to the temporary secretary.

The convention shall not proceed to the election of a permanent chairman or transact any businesss until the time fixed for the opening thereof, nor until a majority of the delegates named in the official roll shall be present. It shall

then elect from among its delegates a permanent chairman and a permanent secretary, neither of whom shall be an officer of the state committee, and shall complete its organization. It shall make suitable rules for the conduct of its business, the order of which shall follow the purposes of the convention as stated in section fifty-four. The permanent seceretary shall keep the records of the convention and transmit the same to the state secretary who shall retain them for a period of one year.

The permanent chairman and permanent secretary shall be chosen upon a call of the official roll. Committees of the convention shall be appointed by the convention, or by the permanent chairman, as the convention may order. When the vote of the convention is taken upon the election, nomination or endorsement for nomination of any candidate, the roll of

the delegates shall be called and each delegate when his name is called shall arise in his place and announce his choice, except that when there is only one candidate to be voted for, the roll need not be called, and except also that the monitor of a group, unless a member of the group objects, may announce the vote of such group.

A delegate to a pre-primary convention who corruptly requests or accepts a gift or gratuity under an agreement or with an understanding that his vote shall be given for any particular candidate or any person who offers such a gift or gratuity with such understanding or agreement shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than thirty days or both. Added St.1953,c.406,Sec.8.]

FROM THE AGREED UPON LEGISLATIVE HISTORY FROM THE COURT BELOW

"UNREFORMING THE PARTIES" BY J. PATRICK DOBEL and RONALD R. STOCKTON

Published in COMMONSENSE, Summer, 1979

Something is clearly wrong with our political system. The symptoms of malfunction are obvious; individual participation has dropped precipitously; factionalism has increased and wields greater impact; political debate has shifted from substantive issues to issues of symbolism or of ad hoc self-interest; individuals move from oblivion to the centers of power with astonishing and disturbing ease; fewer citizens than ever before identify with political parties; faith in public institutions declines in a rapid spiral.

While many factors contribute to these tendencies, a fundamental political problem is that political parties are not performing their functions. Without working parties, social cohesion and the ties of one individual to another break down as do the linkages of individuals to political structures. The political effectiveness of the system, particularly its ability to mediate conflict and arrive at a workable consensus, is also considerably impaired.

We believe much of the decline of the party as an effective institution can be traced to certain changes and "reforms" made in recent years. After discussing the functions of the parties and the consequences of their disruption, we will propose several not-too-modest "unreforms" to revivify the parties.

Functions of Parties

It is intriguing that in many countries where there is no organized opposition and no system of free elections, the government nevertheless finds it desirable to maintain political parties and to hold periodic elections. In American society, we think of elections as primarily serving to select between policy alternatives but, in fact, selection of policy alternatives is only one of several functions performed by an election campaign. On a long range basis, the others are more important.

First, elections and parties develop linkages between the individual and the political system.

....

The next page is L 22.

The proposals encompass three areas: primaries and conventions, the civil service merit system, and the expenditure patterns of candidates. Although the proposals center on the federal level, their analogues apply at the state and local levels.

First, all party decisions relating to policy and candidates should be made by conventions at which no more than one-half of all delegates are chosen by primaries. This rule would apply at both federal and state levels and would mean that delegates to the national nominating conventions would be chosen by state conventions rather than by direct vote of the public. We feel strongly that primaries should be used to send a message to the conventions and not to make decisions. This proposal recognizes the role of primaries as a

check on bossism yet avoids the dangers inherent in an unlimited primary.

Second, a modified spoils system should be introduced. All policy-making positions should continue serving at the behest of the administration in power. In non-policy civil service grades, however, 5-10 percent of all new federal appointments which open as a consequence of retirement or new funding should be filled on the basis of demonstrated civil service competence and the political recommendations of the party. These positions would be allocated to state party commissions on the basis of the parties' performances in the last presidential election. Seventy percent of the positions would go to the party which carried the state and 30 percent would go to the losing party. Additionally the Hatch Act should be

repealed or modified to allow government employees full participatory rights.*

*(Ed.Note) Lest the Democratic authorship of the article be in doubt, this proposal is one on which most Republicans, in the past, have disagreed with the authors, while not wholly dissenting from the notion that a patronage system does have its virtues. As this issue went to press, the entire subject was somewhat clouded by a ruling from the U.S. District Court in Chicago, that political patronage represents an unconstitutional deprivation of equal protection and due process of the law. Shakman, et al. v. Democratic Organization of Cook County, Civil No. 69C2145 (1979)

....

The next page is L 30.

Shifting the balance back to a caucus and reintroducing spoils takes account of the fact that real-life politics is a human activity. Political work requires time and energy. Most of us do not have or only occasionally have the fervor to spend long hours for an ideal or crusade. But we usually can care if there are possibilities of real human satisfactions from working with people, having responsibility, influencing and meeting candidates, and going to conventions. It might even mean a job for oneself or people we care about.

New decision power and the resources of new people and patronage will give the party its own bargaining chips to counteract the sources of economic or ideological political wealth. The self-interest of candidates will lead them back to work with the parties: first, the party will

be the focus of critical decisions for their own continued career; second, politicians will need the patronage and have to meet with the state party apparatus to gain access; third, the party can once again provide an independent haven to support its own political integrity against the specific and rigid demands of single-interest groups; fourth, with limits upon media expenditures, candidates will not be able to ride a media-coteria route to office and will need party resources; fifth, candidates will work with the party in election years since all state politicians gain from the success of the party through the patronage pool.

The reestablishment of a working relationship between politicians and their parties will make party loyalty an issue for the politician. The party's new

negotiating position would give it some small chance of reintroducing some responsibility and discipline into its own ranks. Confronting real people in smoke-filled rooms and conventions is far more efficacious for political accountability than making television commercials. Candidate training would be more complete: they would learn bargaining, communication, and compromise skills, and party structure would gradually generate new candidacies from its own ranks. Coteries would be less closed since candidates could no longer hide behind television screens; more hard bargaining would take place and coteries would be more open and co-optative.

Our proposals will not end the paralysis of American politics or create a new consensus, but ....

FROM THE AGREED UPON LEGISLATIVE HISTORY

FROM THE COURT BELOW

"DEMOCRATIC COMMISSION DRAFTS PARTY CHARTER" BY JEROME MILEUR

Ed McColgan, a former state legislator and unsuccessful candidate for Congress in 1976, told the Massachusetts Democratic Charter Commission last fall that there is "almost no real Democratic Party organization in this state at the local level." In his bid for Congress, McColgan said, only 14 of the 88 Democratic town and city committees in the First District gave any financial help, and only about ten others even "took the time to meet and endorse me." "You court ward and town committees," he added, "because you

have to, but in almost all cases they're an insignificant factor."

McColgan's lament became a familiar refrain to the 25 members of the Charter Commission, which was created last September by then-state party chairman Charles Flaherty after being mandated by vote of the party's 1977 state issues convention. The Commission began its work in October by holding seven public hearings attended by several hundred Democrats across the Commonwealth. Several themes ran through the testimony it hears: the organizational decay of the party at its grass roots, the weakness of the state committee, and the absence of party discipline and accountability.

In November, when the Commission turned to the actual drafting of a charter, there was general agrteement among its members that significant changes would

have to be made in party structure if the desires of rank-and-file Democrats for a stronger party were to be realized. The Commission unveiled its work in late March, and the draft charter now being circulated to Democratic town, ward and city committees does indeed call for major changes in current party structure.

The proposed charter restores the state convention, which was abolished in 1972 by a Democrat-controlled state legislature. In fact, the charter calls for two kinds of state conventions -- an issues convention in odd-numbered years to adopt a party agenda, and an endorsing convention to pick candidtes for statewide (Constitutional and U.S. Senate) offices in even-numbered years when any are to be filled. Many local Democrats attributed the deterioration of town and ward commit-

tees to the elimination of state conventions; and former House Speaker, David Barrley, at a recent state party gathering in Northampton, called the vote to repeal the convention, taken during his tenure as Speaker, a "mistake."

The draft charter also changes the way in which conventions are organized and operate. Delegates are to be allocated to towns and cities on the basis of "one-Democrat, one-vote" formula, and are to be chosen at local party caucuses open to all enrolled Democrats and not just to members of local party committees. Resolutions for issues conventions are to be developed through processes beginning at local caucuses, and are to be adopted by majority vote of the convention. Convention endorsements are also to be made by majority vote, but any candidate receiving at least 20 percent of the vote on any ballot

for a particular office would be permitted to challenge the convention endorsement in the state primary.

Several major changes are proposed for the party's state committee, which was a target of frequent criticism from town and ward Democrats, Reflecting recommendations from local Democrats, the charter provides for the election of state committee members by direct vote of town and ward committee members, rather than at presidential primaries, and for shortening state committee terms from four to two years. The first links the state committee organizationally to local party committees, and the second affords the latter frequent opportunity to hold their state committee members accountable to local interests and concerns.

The proposed charter also spells out the duties and responsibilities of the

state committee. It gives the committee responsibility for conducting the party's state campaigns, filling vacancies in party nominations for statewide or congressional office, formulating and disseminating statements of party policy, and raising and disbursing monies needed to operate the party. It furthermore directs the state committee to set standards for local committee by-laws, to maintain regular communication and provide training and other services for local committees, and to monitor local committees and elected officials of the party to assure support for candidates and policies of the party.

The draft charter, in addition, enlarges the size of the state committee from its present 90 members to approximately 300, a change intended to broaden and diversify participation in party

affairs at the state level. The great majority of state committee members, 250 of the total, are to be elected by members of local party committees, with the remainder being ex-officio (Democratic constitutional officers, state legislative leaders, members of Congress and of the national committee) and affirmative action members. The charter also requires that the state committee meet at least six times a year, and that individual state committee members meet at least twice annually with town, ward and city committees within their districts.

The Commission has struggled with the question of what the district should be from which to elect state committee members. At present, they are chosen from state senate districts, and the Commission initially agreed to continue this practice. It subsequently reconsidered that

decision, flirted briefly with counties as the unit from which to elect state committee members, and settled finally on congressional districts. The problem has been to find a unit that is simultaneously fair to all elements in the party -- geographic and other -- and workable. It is a problem to which the Commission will no doubt return.

The proposed charter makes several changes in the election and organization of local party committees. Town and ward committee members will continue to be elected at presidential primaries for four-year terms, but slate voting is eliminated and instead candidates for local committee positions will file as individuals. Officers of local committees will be elected every two years, rather than every four as is now the case, and local committees will be required to meet

at least six times a year. these changes, like those in the state committee, reflect recommendations made repeatedly during the Commission's fall hearings.

Another recommendation advanced frequently by rank-and-file Democrats was that the Commission authorize local committees to remove so-called "dead wood" (inactive members) and to discipline those who supported candidates of another party. In this regard, the draft charter provides that state and local committee members may be removed through procedures guaranteeing due process and requiring majority vote of committee members for the following reasons: failure to attend half of the regularly scheduled committee meetings in a calendar year, public opposition to a

nominee of the party or public support for another party or candidate thereof, unauthorized use of the party name or resources, or conviction after appeals are exhausted of a criminal offense other than a misdemeanor.

The proposed charter does a number of other things as well. It establishes a five-member state judicial council responsible for compliance of state and local committees with the charter and for adjudicating disputes arising from it or between party committees at any level. It mandates a program of affirmative action and outreach designed to encourage full participation in party affairs at all levels by all segments of the population. Finally, it requires the state committee to adopt codes of ethical conduct and fair ampaign practices for all party members and candidates, requires party meetings at

all levels to be open to the public, and eliminates secret and proxy voting.

A Worcester Democrat told the Commission last fall, "People who are Democrats have the right to expect that they'll have something to say about what their party and its officials do." The proposed party charter is designed to give rank-and-file Democrats that right. The charter has now gone to Democratic town, ward and city committees for their reactions, after which the Commission will make revisions as seem appropriate. The Commission's final draft will be submitted for ratification to a state charter convention presently planned for next September. It will be an opportunity for Democrats in Massachusetts to move toward the strong and responsible party so many desire. It may be the last such opportunity for some time to come.

FROM THE AGREED UPON STATEMENT OF FACTS IN THE DISTRICT COURT

As Incorporated from the Agreed Upon Statement in Langone:

1970 Convention

28. The State Democratic Party held a pre-primary convention on June 12, 1970.

29. The delegates to the 1970 State Democratic convention were selected in accordance with G.L. c. 53 Secs. 54-54D, as then appearing, and the conduct of the convention and the qualifications of candidates to appear on the primary ballot were governed exclusively by the existing state statutory scheme.

1972 Convention

30. The State Democratic Party held a

pre-primary convention on June 10, 1972.

31. The delegates to the 1972 State Democratic convention were selected in accordance with G.L. c. Secs. 54-54D, as then appearing, and the conduct of the convention and the qualifications of candidates to appear on the primary ballot were governed exclusively by the existing state statutory scheme.

32. There were no pre-primary or endorsing conventions conducted by the State Democratic Party between 1972 and 1982.

1979 CHARTER CONVENTION

33. Pursuant to a vote of the Democratic State Committee, the Chairman, Charles F. Flaherty, in February, 1977,

appointed a Charter Commission to draft a proposed charter for the State Democratic Party.

34. The Charter Commission of the Massachusetts Democratic Party submitted a proposed charter which provided in pertinent part in Article Six, Section III, that:

ENDORSING CONVENTION

> There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the provision that any nominee who recieves at least 20 percent of the Convention vote on any ballot for a particular office may challenge the convention endorsement in a State Primary Election.

34A The documents which are attached hereto as Attachments 7A through 7D are true copies of documents which are attached hereto as Attachments [legislative history documents included in this appendix] are true copies of documents which were available to the Charter Commission during its deliberations.

35. The delegates at the 1979 Charter convention were elected at caucuses on March 24, 1979, conducted in each ward and town in the Commonwealth. Approximately, 30,000 individuals participated in the caucuses.

36. Any and all registered democrats

could take part in the caucuses which elected the delegates to the 1979 Charter Convention. Registration was determined by official city or town records. There was no requirement establishing the length of time and individual had to have been enrolled in the Democratic Party prior to taking part in the caucuses which elected delegates to the 1979 Charter Convention.

37. A convention of the State Democratic Party was held on May 19, 1979 for the purpose of adopting a Charter for the State Democratic Party.

***

39. On May 19, 1979, a notice was distributed to all delegates attending the 1979 Charter Convention. A true copy of

that notice is attached hereto and incorporated herein as Attachment No. 8.["Important Notice" legislative history document included in this appendix]

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42. Defendant Michael J. Connolly, as a Democrat holding the position of Secretary of the Commonwealth, was and is a member of the Democratic State Committee. As a member of the Democratic State committee, he attended the Charter Convention as a voting delegate...

***

44. During the November 17, 1979 continuation of the Charter Convention an amendment was adopted to amend Article Six, Section III, by substituting "15%"

in place of "20%".

45. The question of whether legislation would be necessary to implement the 15% requirement imposed by Article Six, Section III of the Charter was discussed by the Convention delegates and was unresolved.

46. The provisions of Article Six, Section III, as they currently read, were adopted at the November continuance of the Charter Convention.

1982 CONVENTION
***

58. If allowed, Chester G. Atkins, the Chairman of the Democratic State Committee would testify that he stated at said meeting his opinon that the case of

Democratic Party of U.S. v. Wisconsin, 450 U.S. 107 1981), could make Article Six, Section III and the "15 percent rule" contained therein effective without legislation.

***

61. Delegates to the 1982 Endorsing convention were elected at caucuses conducted in each ward and town of the commonwealth on february 6, 1982. The primary notice of the 1982 Democratic caucuses given to registered Democrats was by newspaper announcements run at least once in every daily or weekly newspaper throuyhout the the Commonwealth. Notices were also sent to affirmative action organizatons throughout the Commonwealth.

62. Any and all registered democrats could take part in the February 6, 1982 caucuses. To take part in the February 6, 1982 caucuses an individual had toahve been enrolled in the Democratic Paty on or before December 31, 1981, as determined by official city or town records.

63. Approximately 100,000 individuals participated in the caucuses held on February 6, 1982.

***

97. Since 1972, no Democrat who has obtained the nomination of the Democratic Party at a state primary for a statewide elective office, has lost in the general election.

Legislative History, Att.8, refered to in

39 above:

DEMOCRATIC STATE COMMITTEE Chet Atkins, Chairman, 14 Beacon Street*Suite 719*Boston*Massachusetts 02108*(617) 367 4760

IMPORTANT NOTICE

TO:CONVENTION DELEGATES
FROM: DEMOCRATIC STATE COMMITTEE

There is presently a case before the United States Supreme Court (Marchioro v. Chaney) which may directly affect the actions taken at today's convention.

In July of 1978, the Washington State Supreme Court ruled on a case involving a conflict between state law and party law. By a vote of 5-4, the court held that the provisions of state law prevailed over the

provisions of the state's Party Charter.

This decision has been appealed to the U.S. Supreme Court. The decenting[sic] opinion from the Washington State Supreme Court held that a Party's internal organization should be decided by the Party without regard to state law.

There is a distinct possibility that the decision of the Washington State Supreme Court will be reversed by the U.S. Supreme Court, and that a Party Charter will be held to supersede state law.

Please keep this in mind when voting on the Charter.

(3)

No. 85-1094

Supreme Court, U.S.
FILED
JAN 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1985

Alwin E. Hopfmann, Gregory Hession, Clarence Perkins, Clarence Paulin and Beth Sullivan,
Appellants,

v.

Michael Joseph Connolly, Francis X. Bellotti, Chester G. Atkins, and the Democratic State Committee of Massachusetts,
Appellees.

On Appeal From The United States Court of Appeals For The First Circuit

---

Motion Of Appellees Connolly And Bellotti To Dismiss The Appeal Or To Affirm Or, In The Alternative, Brief In Opposition To The Petition For A Writ Of Certiorari

---

FRANCIS X. BELLOTTI
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26 pp

I. QUESTIONS PRESENTED

1. Whether the Massachusetts statutory scheme for obtaining access to the state primary ballot, which accommodates and effectuates party rules that neither defeat the purpose of a primary election system nor violate the constitutional rights of candidates and voters, violates the First and Fourteenth Amendments to the United States Constitution.

2. Whether the Massachusetts Democratic Party's 15% Rule, which is accommodated by and incorporated in the state statutory scheme, violates the First and Fourteenth Amendments to the United States Constitution.

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III. MOTION TO DISMISS OR TO AFFIRM THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Pursuant to Rule 16 of the Rules of this Court, respondents Connolly and Bellotti move that the appeal be dismissed or that the judgment of the United States Court of Appeals for the First Circuit be affirmed on the ground that it is plainly correct and the questions presented by the jurisdictional statement are so unsubstantial as not to warrant further argument.[1/]

1/ The appellants have sought to invoke the appellate jurisdiction of this Court pursuant to 28 U.S.C. §1254(2), claiming that a statute of the Commonwealth of Massachusetts has been declared repugnant to the Constitution of the United States by the First Circuit Court of Appeals. The Appellees, Secretary Connolly and Attorney General Bellotti, respectfully submit that no state statute has been invalidated and therefore the appellate jurisdiction of this court has been improperly invoked. They therefore request that this submission be treated, in the alternative, as a Brief in Opposition to the Petition for a Writ of Certiorari.

IV. STATEMENT OF THE CASE

This action again challenges both a party rule and the Massachusetts statutory scheme which incorporates it, limiting access of candidates for statewide office to the Democratic primary ballot. The appellant, a candidate for the Democratic nomination for the office of United States Senator in 1982, and four of his supporters attack the constitutionality and validity of the so-called "15% Rule"[2/] of the Massachusetts Demo-

---

2/ Article Six, Section III of the Charter of the Massachusetts Democratic Party was amended in 1979, so as to read in pertinent part: "[E]ndorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the provision that any nominee who receives at least 15% of the convention vote on any ballot for a particular office may challenge the convention endorsement in a State Primary election."

This rule is commonly referred to as the "15% Rule."

cratic Party. That rule, which has been incorporated into the state statutory scheme, Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446 N.E. 2d 43, cert. denied, sub. nom. Bellotti v. Connolly, 460 U.S. 1057 (1983), requires candidates for statewide office to obtain at least 15% of the votes on any ballot at the Democratic state nominating convention.

The rule was given effect by the State Secretary, who refused to place on the 1982 primary ballot the name of any candidate for statewide office who had failed to obtain the necessary convention vote. Mr. Hopfmann failed to obtain 15% of the convention vote in 1982 and was among those denied a place on the ballot by the State Secretary.

Hopfmann brought his quarrel with the rule to the United States District Court for the District of Massachusetts.

That Court considered motions to dismiss filed by the various defendants and plaintiffs' motion for summary judgment. Judgment was granted in favor of all defendants. The District Court's decision on the appellants' First and Fourteenth Amendment challenge was based upon the express adoption of the decision of the Massachusetts Supreme Judicial Court in Langone v. Secretary of the Commonwealth, supra, and upon this Court's summary disposition of that case, Bellotti v. Connolly, 460 U.S. 1057 (1982). Memorandum and Order of the District Court, (OB 36, at 39-41).

On appeal, the Court of Appeals for the First Circuit affirmed the District Court's judgment. Hopfmann v. Connolly, 746 F.2d 97 (1st Cir. 1984). Thereafter the appellants filed a jurisdictional

statement seeking further review. On May 18, 1985 this Court granted certiorari, vacated the decision of the First Circuit Court of Appeals to the extent that it relied upon the summary dismissal in Bellotti v. Connolly, and remanded the case for further consideration. Hopfmann v. Connolly, __ U.S. __, 105 S.Ct. 2106 (1985).

Following additional briefing, the Court of Appeals again affirmed the District Court's judgment, this time explicitly finding the decision of the lower court, based upon the reasoning articulated by the Massachusetts Supreme Judicial Court in Langone v. Secretary, supra, to be correct. Hopfmann v. Connolly, 769 F.2d 24 (1st Cir. 1985).

The appellants once again seek plenary review of the issue of the constitutionality of the Massachusetts Democratic Party's 15% Rule.

V. ARGUMENT

A. The Massachusetts Statutory Scheme For Obtaining Access To The State Primary Ballot, Which Accommodates And Effectuates Party Rules That Neither Defeat The Purpose Of A Primary Election System, Nor Violate The Constitutional Rights Of Candidates And Voters, Does Not Violate The First And Fourteenth Amendments To The United States Constitution.

The appellants' First and Fourteenth Amendment argument turns on the soundness of the reasoning of the highest court of the Commonwealth in a case this Court has already declined to review. In that case, the Massachusetts Supreme Judicial Court definitively construed the statutory scheme that provides access to the state primary ballot. Langone v. Secretary of the Commonwealth, supra.

The court reasoned that a construction of the state statutory scheme which did not effectuate party rules imposing additional requirements on gaining ballot access, could unconstitutionally deprive regular party members of their right of political association as guaranteed by the First and Fourteenth Amendments. Langone, 388 Mass. at 194. The Supreme Judicial Court found that the right of political association included the ability to guarantee that a party's nominee demonstrates a modicum of support from those who have substantial contact with the party. Langone, 388 Mass. at 193. Accordingly, the Court adopted a statutory construction that allowed political parties to supplement the statutory requirements.

Langone, 388 Mass. at 193-194.[3/]

More specifically, the court held that the state statutes encompass party rules that impose additional requirements on gaining access to the primary ballot, such as the 15% Rule of the state Democratic party. Langone, 388 Mass. at 195. ("[W]e treat the rule as though it were expressly contained in G.L. c. 53").

3/ The Attorney General had challenged the validity of the 15% Rule, arguing that G.L. c. 53 set the only requirements for primary ballot access, in a companion case consolidated within Langone v. Secretary of the Commonwealth, 388 Mass. 185 (1983). The Supreme Judicial Court's decision to the contrary, on which future review was denied in this Court, Bellotti v. Connolly, supra. is binding on the Attorney General and requires his defense of the 15% Rule in this litigation.

That statutory construction is binding not only on the state officers who are appellees in this case, but also upon the federal courts construing the same statute. Gurley v. Rhoden, 421 U.S. 208, (1975); Mullaney v. Wilbur, 421 U.S. 684, 691, (1975).

The issue then is whether the state statutory scheme, which incorporates and accommodates party rules, violates the right of political association held by Mr. Hopfmann and his supporters.

The reasoning of the state court is pivotal on this issue as well, because both lower federal courts explictly adopted it in upholding the position of

the state appellees.[4/] In a sense, then, this petition merely presents an inappropriate collateral attack on a state court decision this court has previously declined to review. The appellees submit that, once the state statutory scheme was authoritatively construed to include the party rule, the constitutionality of the procedure for gaining access to the primary ballot became evident.

4/ The District Court specifically accepted the reasoning and conclusions of the Massachusetts Supreme Judicial Court in Langone, supra. Memorandum and Order of the District Court (OB 36 at 39) ("I am in agreement with the decision of the Supreme Judicial Court upholding the Rule's validity, and for the reasons expressed therein. Extensive repetition of those reasons is unnecessary."). On appeal, the First Circuit Court of Appeals also relied upon the state court decision as the appropriate articulation of the constitutional analysis. Hopfmann v. Connolly, 769 F.2d 24 at 25 (App. AA 1 at 5) ("Like the district court below, we agree with the analysis of this issue, by the Massachusetts Court, and do not consider it neccessary to repeat that court's discussion at length.").

The appropriate analysis begins with the application of traditional constitutional principles in considering the validity of the statutory scheme. First, it was quickly and appropriately recognized that the enforcement of a party rule is "state action subject to constitutional scrutiny." Langone, 388 Mass. at 195 (citations omitted).

Second, the court found that the rights of candidates and their supporters to obtain ballot access are inextricably intertwined and fundamental. Langone, 388 Mass. at 196. But the statutory scheme, incorporating party rules such as the Democratic Party's 15% Rule, considered in a "realistic light," was found by the court not to have a sufficient impact on the candidates' rights to warrant strict scrutiny. Id. at 197. The statutory

scheme effectuating the party rule was then found to be rationally related to the legitimate objectives of protecting the right of the Democratic Party and its members to associate and of maintaining the integrity and stability of the existing political parties. Id. at 198. Accordingly, the constitutionality of the statutory scheme was upheld.

As demonstrated in the ensuing discussion of the validity of the 15% Rule itself, this reasoning is clearly supported by a long line of prior decisions rendered by this Court and does not present a substantial federal question. There is no split of authority between the circuits on these issues. There are no special and important reasons which would justify further review. Hence plenary consideration by this Court is unnecessary.

B. The Masachusetts Democratic Party's 15% Rule, Which Is Accommodated By And Incorporated In The State Statutory Scheme Does Not Violate The First And Fourteenth Amendments To The United States Constitution.

A second and subsidiary issue is presented as to the constitutionality of the 15% Rule itself. The state officials in this action are not the proper parties to offer the primary defense of the party rule and defer to the party and its chairman, who are also appellees, to offer those arguments. The state appellees note that the Supreme Judicial Court's decision, adopted by both the District Court and the Court of Appeals, considered the validity of the 15% Rule and found that it did not impose a significant burden on the constitutional rights of candidates or their supporters.

The right asserted by Mr. Hopfmann and the other petitioners is the right to obtain a place on the Democratic state primary ballot. That right, of course, is circumscribed by the legitimate interest of the state in ensuring that candidates that appear on the ballot have demonstrated a significant modicum of support. Jenness v. Fortson, 403 U.S. 431, 442 (1971). The injury that is alleged results from requiring candidates for the Democratic nomination to demonstrate a modicum of support at the state nominating convention. This is far from freezing the political status quo, found to be unconstitutional in Williams v. Rhodes, 393 U.S. 23 (1968). The burden of securing 15% of the convention vote is not more onerous than other restrictions imposed on ballot access previously

upheld by the Supreme Court. See Jenness v. Fortson, 403 U.S. 441 (1971) (upholding requiring independent candidate to obtain signatures of 5% of the eligible voters in a 180 day period); Storer v. Brown, 415 U.S. 735 (1974) (upholding a one year disaffiliation requirement for independent candidates). The 15% Rule is the type of generally applicable and evenhanded restriction that has traditionally been upheld. Anderson v. Celebrezze, 460 U.S. 780, 789 n.9 (1983).

The specific interests advanced by the state have been repeatedly recognized and upheld. This Court has recognized the rights of the Democratic party and its members to have an effective role in selecting the party's nominees. See Democratic Party of the United States v. Wisconsin, 450 U.S. 107 (1981) (recognizing the right of the national party to

seat delegates at the national convention, notwithstanding a contrary state statute). The interest of preserving the integrity of the electoral process has long been established. Roasario v. Rockefeller, 410 U.S. 752 (1973) (upholding an eight to eleven month disaffiliation requirement as necessary to prevent party raiding). Other courts have repeatedly and uniformly found that political parties must be allowed meaningful involvement in establishing voter qualifications and ballot access requirement. See, Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265 (2nd Cir. 1985) prob. juris. noted 54 U.S.C.W. 3460 (U.S.S.Ct. Jan. 13, 1986) (striking a state statute providing that only enrolled members of a political party could vote in the state sponsored primary election in light of a party rule allowing independent voters to participate in the party's primary);

Tansley v. Grasso, 315 F.Supp. 513 (D. Conn. 1970) (upholding a state statute requiring candidates to obtain 20% of a party convention vote to have their names placed on the primary ballots); Clark v. Rose, 379 F.Supp. 73 (S.D.N.Y. 1974) (upholding a statutory provision providing that an independent candidate could not run in a party's primary or receive its nomination without first obtaining the authorization of the party's state committee).

These interests, as advanced by the state, justify the burden imposed on would-be candidates. The legitimate state interest in preserving the Democratic party's role in selecting its nominees justifies the requirement that candidates be involved in the party process at the nominating convention.

Requiring candidates to obtain at least 15% of the party's convention vote is precisely tailored to protect this state interest.

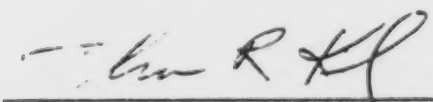
Therefore, the question of the constitutionality of the 15% Rule does not present a substantial federal question and plenary review by this Court is not appropriate.

VI. CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the First Circuit should be summarily affirmed and the appeal dismissed. To the extent that the appellant's pleading is treated as a Petition for a Writ of Certiorari, it should be denied.

Respectfully submitted,

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Dated: January 27, 1986

Supreme Court, U.S.
F I L E D
JAN 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1094

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

ALWIN E. HOPFMANN, GREGORY HESSION, CLARENCE PERKINS, CLARENCE PAULIN and BETH SULLIVAN,

Appellants,

v.

MICHAEL JOSEPH CONNOLLY, FRANCIS X. BELLOTTI, CHESTER G. ATKINS and THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION OF APPELLEES CHESTER G. ATKINS AND THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW OR, IN THE ALTERNATIVE, BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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QUESTIONS PRESENTED

1. Does this Court have appellate jurisdiction over this matter pursuant to 28 U.S.C. §1254(2) where the Court of Appeals upheld a state statutory scheme against an assertion that it was repugnant to the Constitution of the United States and where no substantial federal questions are presented? 1/

1/ Appellants' previous appeal of this matter was dismissed by this Court for want of jurisdiction. Hopfmann v. Connolly, ___ U.S. ____, 105 S. Ct. 2106 (1985) (dismissing appeal for want of jurisdiction but granting alternative petition for certiorari, vacating judgment below in part and remanding for further proceedings).

2. Is Article Six, Section III of the Charter of the Massachusetts Democratic Party (the "15% Rule") 2/,which has previously been reviewed and upheld by the Massachusetts Supreme Judicial Court in the related case of Langone v. Secretary of the Commonwealth 388 Mass. 185, 446 N.E. 2d 43, app. dism'd and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983), repugnant to the Constitution of the United States insofar as it applies to candidates for the Massachusetts Democratic Party's nomination for the office of United States Senator?

2/ Article Six, Section III of the Charter of the Democratic Party for the Commonwealth of Massachusetts (the "15% Rule"), adopted at the

(Footnote Continued)

(Footnote Continuation)

party's 1979 Charter Convention, provides for party endorsement of candidates for state-wide elective office (Governor, Lieutenant Governor, United States Senator, Attorney General, Secretary of State, State Treasurer and State Auditor) through the mechanism of an election year Endorsing Convention. Endorsements are made by a majority vote of the delegates present and voting. However, candidates who, on any ballot, receive at least 15% of the votes cast at the Endorsing Convention for the state-wide office they seek and who otherwise meet the requirements of M.G.L. c. 53 may challenge that endorsement at the primary election. The candidate receiving a plurality of the votes cast at the Democratic primary becomes the Democratic nominee in the general election. M.G.L. c. 53, §2. The Massachusetts Supreme Judicial Court has construed the "15% Rule" as being incorporated into the state statutory scheme governing selection of the Democratic party nominees for statewide elective office. Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446 N.E. 2d 443, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983). (The text of Article Six, Section III is attached to this Motion as Appendix A, and a copy of the Massachusetts Supreme Judicial Court's opinion in Langone is attached as Appendix B.

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INTRODUCTION

Pursuant to Rule 16 of the Rules of this Court, appellees Chester G. Atkins (Chairman of the Massachusetts Democratic Party) and the Democratic State Committee of Massachusetts hereby move that the appellants' Appeal be dismissed for want of jurisdiction or that the judgment of the United States Court of Appeals for the First Circuit be affirmed on the ground that it is plainly correct and the questions presented by the Jurisdictional Statement are so insubstantial as not to warrant further argument.

For these same reasons, insofar as appellants' papers are treated as a Petition for Certiorari, these appellees oppose that Petition and request that this submission be treated in the alternative as a Brief in Opposition to the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the state statutory and federal Constitutional provisions cited by appellants, M.G.L. c. 52, §10; M.G.L. c. 53, §§2, 6, 9, 37, 38, 46 and 48; M.G.L. c. 54, §§116 and 116A; and Article Six, Section III of the Charter of the Massachusetts Democratic Party were also involved in the decision below. The pertinent texts of these additional provisions of the state statutory scheme for nomination and election of candidates for state-wide office are set forth in Appendix A and Appendix F.

STATEMENT OF THE CASE

On June 4, 1982, appellants Alwin Hopfmann, a candidate for the Democratic Party nomination for the office of United States Senator from Massachusetts, and registered voters

Gregory Hession, Clarence Perkins, Clarence Paulin and Beth Sullivan (together hereafter referred to as "Hopfmann"), filed a five-count Complaint against defendants Michael J. Connolly (Secretary of State of the Commonwealth of Massachusetts); Francis X. Bellotti (Attorney General of the Commonwealth); Chester G. Atkins (Chairman of the Democratic State Committee of Massachusetts); and the Massachusetts Democratic State Committee ("appellees") in the United States District Court for the District of Massachusetts. Hopfmann's Complaint, challenging the validity and effect of the Massachusetts Democratic Party's "15% Rule" on federal and state constitutional and statutory grounds, sought declaratory and injunctive relief requiring Secretary Connolly to place Hopfmann's name on the September 14, 1982 Democratic Party state primary

ballot as a candidate for the Democratic Party's nomination for the office of United States Senator.

On June 16, 1982, Attorney General Bellotti moved to dismiss or stay the proceedings below pending the decision of the Massachusetts Supreme Judicial Court in the related proceeding of Langone v. Secretary of the Commonwealth, SJC Case No. 82-214. 3/ That motion was granted on June 21. On June 22, 1982, at Hopfmann's request, the District Court directed that a three-judge court be convened to hear and decide Hopfmann's claims under the Voting Rights Act, 42 U.S.C. §§1973, et seq., concurrently with the District

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3/ Langone v. Secretary of the Commonwealth was decided on July 9, 1982 and the Supreme Judicial Court's opinion in that case was later reported at 388 Mass. 185, 446 N.E.2d 443, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983) [Appendix B]

Court's consideration of Hopfmann's other claims. On June 24, 1982, Atkins and the Committee filed answers as well as a motion to dismiss. On June 30, 1982, Secretary Connolly likewise filed an answer and a motion to dismiss.

On June 29, 1982, Hopfmann filed a motion for a temporary injunction requiring Secretary Connolly to place Hopfmann's name on the Democratic primary ballot. After briefing by all parties, oral argument, and the submission of the Statement of Agreed Facts from Langone v. Secretary of the Commonwealth, supra, the three-judge panel and the District Court below (as single judge) both denied Hopfmann's motion on the ground that Hopfmann did not have the requisite "reasonable prospect of success" on any of his claims. Hopfmann, et al. v. Connolly, et al., Civil Action No. 82-1530-MC, Memoranda and Orders entered

July 7, 1982. On July 8, 1982, Hopfmann filed an application in this Court seeking a stay of these denials of preliminary relief and an order directing Secretary Connolly to place his name on the Democratic primary ballot. That application was denied by Justice Brennan on July 8, 1982 and, after resubmittal by Hopfmann, denied again by Justice Rehnquist on July 9, 1982. Hopfmann, et al. v. Connolly, et al., United States Supreme Court, Case No. A-18 (1982).

On September 20, 1982, Hopfmann filed a petition for writ of habeas corpus in this Court requesting that his name be placed on the Democratic primary ballot. That petition was denied by the full Court on October 18, 1982. In re Hopfmann, United States Supreme Court, Case No. 82-488, 51 U.S.L.W. 3298 (1982). On September 30, 1982, Hopfmann filed a

petition for writ of prohibition and/or mandamus and/or injunction in this Court, once again requesting that his name be placed on the Democratic primary ballot. That petition was denied by this Court on November 29, 1982. In re Hopfmann, United States Supreme Court, Case No. 82-610, 51 U.S.L.W. 3403 (1982). On October 25, 1982, Hopfmann filed an application in this Court seeking a stay of the general election or, in the alternative, a special primary election, which was denied by Justice Brennan on October 26, 1982, and, after resubmittal, again denied, this time by the full Court, on November 1, 1982. In re Hopfmann, United States Supreme Court, Case No. 82-610 (A-388), 51 U.S.L.W. 3339 (1982). Hopfmann's applications to this Court to enjoin the Governor of Massachusetts from certifying the election of Senator Edward M. Kennedy

and the United States Senate from seating him were denied by this Court on November 5, 1982. In re Hopfmann, United States Supreme Court, Case No. 82-610 (1982).

On September 30, 1982, the District Court denied appellees' renewed motions to dismiss, without prejudice to their renewal at a later date in light of developments in other courts. 4/ On October 26, 1982, Hopfmann filed a renewed motion for preliminary relief in the District Court and, on November 3, 1982, a motion for summary judgment.

A copy of the opinion of the Massachusetts Supreme Judicial Court in

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4/ An appeal from the Supreme Judicial Court's July 9, 1982 decision in Langone v. Secretary of the Commonwealth, supra, was then pending in this Court. This Court later dismissed that appeal for want of jurisdiction and denied the parallel petition for a writ of certiorari. Bellotti v. Connolly, 460 U.S. 1057 (1983).

the related case of Langone v. Secretary of The Commonwealth, 388 Mass. 185, 446 N.E.2d 43 (1983), [Appendix B] was filed with the District Court on February 23, 1983, and a copy of this Court's dismissal of the appeal and denial of the alternative petitions for certiorari in that case (Bellotti v. Connolly, 460 U.S. 1057 (1983)); was filed with the District Court on April 8, 1983. Shortly thereafter, appellees Atkins, Secretary Connolly and the Committee filed renewed motions to dismiss.

On February 9, 1984, appellants Hopfmann and Sullivan filed a new action in the District Court below seeking to have the "15% Rule" applied to all candidates for statewide political office and for President of the United States, regardless of party affiliation. Hopfmann, et al. v. Connolly, et al., Civil Action No.

84-393-MC. Defendants in that case moved to dismiss the Complaint.

On April 9, 1984, deciding both cases together and treating appellees' motions to dismiss as motions for summary judgment, the District Court granted appellees' motions and dismissed both of Hopfmann's Complaints. Hopfmann, et al. v. Connolly, et al., Civil Action No. 82-1530-MC. Hopfmann then appealed this case to the First Circuit Court of Appeals. The District Court's judgment in Civil Action No. 84-393-MC was not appealed, nor was the District Court's dismissal of Hopfmann's claims under the Voting Rights Act. On October 22, 1984 the First Circuit affirmed the judgment of the District Court. Hopfmann v. Connolly, 746 F.2d 97 (1st Cir. 1984). [Appendix C].

On May 13, 1985, this Court dismissed Hopfmann's appeal from the

First Circuit's judgment for want of jurisdiction. Hopfmann v. Connolly, ____ U.S. ____, 105 S.Ct. 2106 (1985). [Appendix D]. However, treating Hopfmann's papers as a petition for certiorari, this Court granted that petition, vacated the First Circuit's decision "to the extent it relied on [this Court's] dismissal of the appeals in Langone [v. Connolly, 460 U.S. 1057]," and remanded the case for further proceedings. Id. The First Circuit then solicited further briefs from the parties and subsequently issued a new opinion, with no reliance on the dismissal of the appeals in Langone, reaffirming its prior judgment on independent grounds. Hopfmann v. Connolly, 769 F.2d 24 (1st Cir. 1985) [Appendix E]. Hopfmann's petition for rehearing was denied by the full bench of the First Circuit on September 23, 1985. Hopfmann's Notice of Appeal to

this Court was filed on December 13, 1985 and his Jurisdictional Statement on December 24, 1985. Counsel for these appellees received the service copies of that Jurisdictional Statement on December 27, 1985.

STATEMENT OF THE FACTS

By statute, the winner by a plurality of the votes cast in the Massachusetts Democratic Party primary becomes the official Democratic Party nominee at the general election. M.G.L. c. 53, §2. Also by statute, voting at the Democratic primary is open not only to enrolled party members, but also to unenrolled or independent voters who declare themselves "Democrats" at the polls just before receiving ballots. M.G.L. c. 53, §37. 5/. These voters may then cancel or change their party registration at the polling places immediately after voting. M.G.L. c. 53, §38. Thus, it is possible for a voter to be only a one-time "primary day Democrat" and have no other affiliation

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5/ As of February 1980, 39.9% of all registered Massachusetts voters were unenrolled. Opinion of the Justices, 385 Mass. 1201, 1205, 434 N.E.2d 960, 962 (fn. 1) (1982).

or desire for affiliation with the Democratic Party. Langone v. Secretary of the Commonwealth, 388 Mass. 185, 193, 446 N.E.2d 43, 47 app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983).

Candidates seeking to have their names placed on the Democratic primary ballot for statewide office must satisfy several statutory requirements. The candidate must be an enrolled Democrat, M.G.L. c. 53, §48; file a financial disclosure form with the State Ethics Commission, M.G.L. c. 53, §9; submit nomination papers signed by at least 10,000 registered voters who can be either Democrats or independents, M.G.L. c. 53, §44, M.G.L. c. 53, §46; and comply with all party rules governing primary ballot access that neither defeat the purpose of a primary election nor violate the constitutional rights of candidates or voters.

Langone, supra, 388 Mass. at 194, 446 N.E.2d at 48. As observed by the Massachusetts Supreme Judicial Court, absent the "15% Rule", nothing in the statutory scheme would prevent a candidate who lacked the support of a single registered Democrat from being placed on the Democratic primary ballot and, notwithstanding little or no support from the regular party membership, from potentially becoming the Democratic Party candidate in the general election. Langone, supra, 388 Mass. at 191, 446 N.E.2d at 46.

Concerned with the decline of the party's organizational effectiveness and, in particular, with the fact that the then-existing statutory scheme allowed a candidate who did not share the party's ideals, had no intention of furthering those ideals if elected, and had no party accountability, to run for office as the official Democratic Party

nominee, the Democratic Party in 1977 appointed a Commission to draft a proposed state party Charter. The Commission held seven public meetings across the Commonwealth and, in the spring of 1979, submitted a proposed Charter to a specially convened Charter Convention. The delegates to the Charter Convention were elected at caucuses on March 24, 1979, conducted in every ward and town in the Commonwealth. All registered Democrats were eligible to take part in those caucuses, which were conducted on a "one Democrat, one vote" basis, and approximately 30,000 party members so participated.

A key provision of the Charter proposed by the Commission concerned the procedure by which the party would choose its nominees for statewide office. Following the model so successfully used (and judicially upheld

against constitutional challenge) in Connecticut, see Tansley v. Grasso, 315 F. Supp. 513 (D. Conn. 1970) (three-judge court), the Commission recommended that party nominees for statewide office be selected by a two-pronged procedure involving convention endorsement 6/ and the primary election. This procedure was set forth in Article Six, Section III, of the proposed Charter. Under this initially proposed version of Article Six, Section III, an Endorsing Convention, to be held in statewide election years, would, by majority vote, formally endorse one candidate for each statewide office. However, the Convention "endorsement" of a candidate

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6/ Although the statute requiring major parties to hold such conventions had been repealed in 1973, Massachusetts law specifically allows party state committees to call such conventions if they so chose. M.G.L. c. 52, §10.

could be challenged at the state party primary by any and all other candidates, otherwise qualified under state law, who, on any Convention ballot, received at least 20% of the votes cast for that office. The party would thus be assured that its ultimate nominee had demonstrated at least a minimal degree of support from the regular party membership in addition to the broad appeal to all voters who consider themselves Democrats which is needed to win the primary election. At the same time, the rights of significant minorities in the Party would be protected by their candidates being able to take their case directly to the primary voters through the "challenge" procedure, thus ensuring an open and democratic choice.

The Charter Convention debated Article Six, Section III -- including its proposed "20%" requirement -- and,

at the November 1979 continuation of the Convention, adopted the overall procedure of convention endorsement and primary selection, but struck a slightly different balance than that recommended by the Charter Commission. The Commission's recommendation that a candidate desiring to run in the primary obtain at least 20% of the votes for the office sought on any ballot at the Endorsing Convention was reduced by the Charter Convention to require only 15% of any such vote. The "15% Rule", as it came to be known, was then adopted by a roll-call vote of over two-thirds of the voting delegates at the Charter Convention. The overall Charter, as amended, was likewise adopted by an over two-thirds roll-call vote.

Under the terms of the Charter, any of its provisions could be amended at any State Convention by majority vote. Article Six, Section III

and its "15% Rule" were reaffirmed at the Party's April 11, 1981 Issues Convention and, in December, 1981, the Party issued its "Preliminary Call to Convention" which gave clear notice that the Party would be holding its 1982 Endorsing Convention pursuant to Article Six. Langone, supra, 388 Mass. at 198, 446 N.E.2d at 50 (fn.6). 7/

The "15% Rule" does not prevent candidates from appearing on the general election ballot. It merely places minimal restrictions on who may run as the official Democratic Party nominee for state-wide elective office to assure that the nominee has at least a degree of support among the regular party membership. Any candidate, including Hopfmann, who was dissatisfied

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7/ The "15% Rule" has been upheld and applied at each and every party convention from the time of its adoption through the present.

with the "15% Rule" could have declared himself an "unenrolled" (independent) candidate and attempted to qualify for the general election ballot as an independent at any time prior to February 4, 1982. M.G.L. c. 53, §6. Likewise, any such candidate was free at all times to conduct a "write in" campaign for the general election. M.G.L. c.54, §§116, 116A. Hopfmann pursued neither option.

On February 6, 1982, delegates to the 1982 Endorsing Convention were elected on a "one Democrat, one vote" basis at caucuses conducted in every ward and town throughout Massachusetts. Persons registered as Democrats prior to December 31, 1981, were eligible to take part in those February 6 caucuses and approximately 100,000 Democrats so participated. The Endorsing Convention was duly held on May 21-22, 1982, and candidates were endorsed for every

statewide office. Two amendments seeking either to repeal Article Six, Section III or postpone its effective date until January 1, 1983, were presented, debated and overwhelmingly defeated. Michael Dukakis was endorsed for Governor, Evelyn Murphy for Lieutenant Governor, and Edward Kennedy for United States Senator. 8/ Both of the candidates for the Party's nomination for Governor, five of the seven candidates for the Party's nomination for the Lieutenant Governorship, and one of the two candidates for the Party's nomination for United States Senator received at least 15% of the Convention votes on one or more ballots for that office and were thus eligible to run in the primary. Hopfmann did not receive 15% of the

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8/ Other candidates were likewise endorsed for the remaining state-wide elective offices.

Convention vote on any ballot for the office of Senator and, consequently, was ineligible. In accordance with the guidance provided by an advisory opinion of the Massachusetts Supreme Judicial Court, Opinion of the Justices, 385 Mass. 1201, 434 N.E.2d 960 (1982), Secretary Connolly did not print Hopfmann's name on the Democratic primary ballot.

The Democratic primary was duly held on September 14 and the General Election on November 2, 1982. Senator Edward Kennedy was the winner of both the primary and the election.

SUMMARY OF ARGUMENT

Because the First Circuit upheld a state statutory scheme against federal constitutional attack, and because appellants have presented no substantial federal questions to this Court, Hopfmann's appeal should be dismissed by this Court for want of jurisdiction. To the extent appellants' papers are treated as a petition for certiorari, that petition should be denied for lack of merit.

Hopfmann's argument that the Massachusetts Democratic Party did not have the right under the First and Fourteenth Amendments to the United States Constitution to adopt the "15% Rule" and have it enforced by the state has already been exhaustively refuted by the Massachusetts Supreme Judicial Court in its comprehensive and well-reasoned unanimous opinion in Langone v. Secretary of the Commonwealth, 388 Mass.

185, 446 N.E.2d 43, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983). The importance of the "15% rule" to the Democratic Party and the fundamental nature of the Party interests which it protects -- to ensure that regular party members have some meaningful say in who their Party's nominees for state-wide office will be, to strengthen the Party structure, and to prevent Party raiding by "election day only" Democrats with little or no loyalty or commitment to the Party -- were carefully identified, analyzed and upheld by the Supreme Judicial Court. Likewise, the Supreme Judicial Court's opinion in Langone exhaustively considered and rejected the grounds on which Hopfmann bases his argument that the "15% Rule" violates his and his supporters' First and Fourteenth Amendment rights to ballot access. As the First Circuit held

below, the correctness of the Langone opinion on these issues, and the correctness of the dismissal of Hopfmann's claims on that same basis in this case, flows inexorably from this Court's decisions in Anderson v. Celebreeze, 460 U.S. 780, 793 (1983); Clements v. Fashing, 457 U.S. 957, reh. denied 458 U.S. 1133 (1982); Rodriguez v. Popular Democratic Party, 457 U.S. 1, 14 (1982); Democratic Party of the United States v. Wisconsin, 450 U.S. 107, 122-24 (1981); Cousins v. Wigoda, 419 U.S. 477, 491 (1975); Storer v. Brown, 415 U.S. 724, 732 (1974); Bullock v. Carter, 405 U.S. 134, 142-45 (1972); Jenness v. Fortson, 403 U.S. 431, 438-42 (1971); and Ray v. Blair, 343 U.S. 214 (1952). See also Republican Party of Connecticut v. Tashjian, 770 F.2d 265 (2d Cir. 1985). The "15% Rule" does not discriminate against any class of candidates or voters, nor disqualify any

candidates from appearing on the general election ballot, nor unfairly or unnecessarily burden the availability of political opportunity; Hopfmann's First and Fourteenth Amendment claims are thus without merit.

To the extent Article I, §4 applies to state party conventions or to party primaries themselves, the Supreme Judicial Court's holding in Langone, supra, construing the Massachusetts election laws (M.G.L. c. 53) as a matter of state law, likewise conclusively resolves both appellants' Article I, §4 and appellants' jurisdictional arguments against them. Under Article I, §4, the "legislature" of a state -- held by this Court to mean the entire state law-making process as construed by that state, Smiley v. Holm, 285 U.S. 355 (1932) -- may regulate the "time, place, and manner" of elections for the office of United States Senator. The state

lawmaking process may constitutionally include political party rules and procedures so long as the party rules so adopted do not otherwise infringe a candidate's constitutional rights. Clark v. Rose, 379 F. Supp. 73 (S.D.N.Y. 1974) (three-judge court), aff'd. 531 F.2d 56 (2d. Cir. 1976). See also Harris v. Conradi, 675 F.2d 1212, 1216 (11th Cir. 1982). As the Massachusetts Supreme Judicial Court ruled in Langone, the Massachusetts statutory scheme includes the "15% Rule". Langone, supra, 388 Mass. at 195-96; 446 N.E.2d at 48-49. See also M.G.L. c. 52, § 10, which specifically empowers party state committees to call conventions. This Court is bound by the Supreme Judicial Court's interpretation of the meaning of Massachusetts statutes. Kolender v. Lawson, 461 U.S. 352 (1983); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Brown v. Ohio, 432 U.S. 161, 168

(1977). Because the First Circuit upheld this state statutory scheme as conclusively interpreted by the state's highest court against appellants' federal constitutional attack, no appeal lies to this Court under 28 U.S.C. §1254(2).

Appellants' two remaining arguments, that the "15% Rule" violates Article I, §3 of the United States Constitution and/or the Seventeenth Amendment, are likewise without merit. Contrary to Hopfmann's assertions, the "15% Rule" does not add any "qualification" to those enumerated in Article I, §3; it merely states an eligibility requirement for candidates who seek the Democratic Party's nomination for that office. A candidate may be elected to that office without being the Democratic Party nominee, and thus not subject to the "15% Rule", by running as an independent, as the

candidate of another party, or by waging a successful "write-in" campaign. Langone, supra, 388 Mass. at 197-98, 446 N.E.2d at 50-51. For the same reasons, appellants' Seventeenth Amendment argument fails. The "15% Rule" does not change the "qualifications" of voters for the office of United States Senator or "dilute" their votes in any way. It applies equally to each Democratic party candidate for state-wide office; and every such candidate has a precisely equal opportunity to obtain delegate support. See also Republican Party of Connecticut v. Tashjian, 770 F.2d 265, 272-75 (2d. Cir. 1985).

ARGUMENT

I. BECAUSE THE COURT OF APPEALS UPHELD A STATE STATUTORY SCHEME AGAINST CONSTITUTIONAL ATTACK, NO APPEAL LIES TO THIS COURT UNDER 28 U.S.C. §1254(2).

Under 28 U.S.C. §1254(2), this Court has appellate jurisdiction over rulings of the Circuit Courts of Appeal

only where the party appealing relied on a state statute held by the Court of Appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. Such is not the case here; indeed, the truth is quite the opposite. 9/ Contrary to appellants' arguments, in upholding the "15% Rule" -- which the Massachusetts Supreme Judicial Court has explicitly held to be part of the state statutory scheme for nominating state-wide Democratic candidates, Langone v. Secretary of Commonwealth, supra -- the First Circuit upheld the state statutory scheme against appellants' Constitutional attack. The Supreme Judicial Court is the "final judicial arbiter" of the meaning of Massachusetts statutes, and

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9/ Hopfmann's previous appeal of this matter was dismissed by this Court for want of jurisdiction. Hopfmann v. Connolly, ___ U.S. ____, 105 S.Ct. 2106 (1985).

its rulings on such questions are binding on this Court. Kolender v. Lawson, 461 U.S. 352 (1983); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Brown v. Ohio, 432 U.S. 161, 168 (1977).

The ruling of the Court below thus upheld a state statutory scheme against appellants' allegation that that scheme was repugnant to the United States Constitution. No appeal lies from such a determination under 28 U.S. §1254(2).

II. WHATEVER FEDERAL QUESTIONS ARE PRESENTED BY THIS APPEAL ARE INSUBSTANTIAL AND WERE CORRECTLY DECIDED BY THE COURT BELOW.

A. The Fundamental Interests of The Democratic Party Which the "15% Rule" Protects.

The importance of the "15% Rule" to the Massachusetts Democratic Party and the fundamental nature of the interests which it protects cannot be overemphasized. The "15% Rule" was and

is the centerpiece of the Party's 1979 Charter which revitalized and democratized the state Party structure. It was adopted by an over two-thirds vote after full debate by the Party's 1979 Charter Convention, which was composed of delegates elected on a "one Democrat - one vote" basis in caucuses, open to all Democrats (30,000 of whom participated), conducted in every ward and town of the Commonwealth, and has been voted on and upheld by every succeeding Party Convention. Over 100,000 Democrats from every ward and town in the Commonwealth participated in the causes that elected delegates to the 1982 Endorsing Convention which appellants challenge -- completely undercutting Hopfmann's claim that the "15% Rule" and the Endorsing Conventions are elitist institutions, controlled by the "party bosses" at the expense of the

party membership. Exactly the opposite is true.

As recognized by the Supreme Judicial Court when it reviewed and upheld the "15% Rule" against precisely the same First and Fourteenth Amendment challenge Hopfmann makes here, the "15% Rule" was adopted by the Party to ensure that regular party members had some meaningful say in who their party's nominees for state-wide office would be, to strengthen the Party structure, and to prevent party raiding by "election day Democrats" with little or no loyalty or commitment to the Party. Langone v. Secretary of the Commonwealth 388 Mass. 185, 446 N.E.2d 43, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983). The mechanism chosen by the Party -- the requirement that candidates for its nomination receive at least 15% of the vote at the Party's Endorsing

Convention on any ballot for the office they seek -- gives those Conventions a purpose and substantive meaning, thus encouraging all Democrats to participate in the caucus delegate selection procedure and so strengthening the Party. Through the Conventions, the ordinary rank and file Democratic Party member finally has access to a mechanism for making himself heard, and his ideas and ideals represented, in a meaningful way. Without this capacity to "speak to power" through the Convention Endorsing votes and the "15%" requirement, the Conventions lose much of their purpose, all of their power, and the caucus and convention structure so carefully nurtured and valued by the Party collapses.

At one and the same time, the "15% Rule" fits into the state statutory scheme regulating party primaries, enables ordinary Democrats to have a

meaningful say in the process by which their candidates are selected and, by only requiring a 15% vote on any ballot for the office sought, protects the rights of significant minorities in the party. It also ensures that whomever the ultimate party nominee is will have demonstrated at least minimal support among the regular party membership and thus a commitment to furthering the Party's ideals and program.

B. The Democratic Party's Right Under the First and Fourteenth Amendments to Adopt the "15% Rule" and Have it Enforced by the State.

In his Jurisdictional Statement, Hopfmann argues that the Massachusetts Democratic Party had no constitutionally protected right to adopt the "15% Rule". That argument -- previously considered and rejected by the Massachusetts Supreme Judicial Court in the related case of Langone v. Secretary of the Commonwealth, 388 Mass.

185, 446 N.E.2d 443, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983) -- is not only wrong; given this Court's unbroken line of First and Fourteenth "right of association" opinions in this area, it is frivolous.

The fundamental right of political parties to establish candidate selection procedures has repeatedly been recognized and upheld by this Court. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 14 (1982); Democratic Party of the United States v. Wisconsin, 450 U.S. 107, 122-24 (1981); Cousins v. Wigoda, 419 U.S. 477, 491 (1975); and Ray v. Blair, 343 U.S. 214 (1952). As noted by the Massachusetts Supreme Judicial Court in its April 1982 advisory opinion regarding the "15% Rule":

> A determination of who will appear on a general election ballot as a candidate endorsed

> by an identified political party is a critical decision for that party. The party, therefore, has a substantial interest implicit in its freedom of association to ensure that party members have an effective role in that decision.

Opinion of the Justices, 385 Mass. 1201, 1204, 434 N.E.2d 960, 962 (1982).

This Court, time and again, has recognized the Constitutional right of a political party to protect its candidate selection process from undue influence by persons who are, at best, "election day" party members or who are not party members at all. See Rodriguez v. Popular Democratic Party, supra; Democratic Party of the United States v. Wisconsin, supra; Cousins v. Wigoda, supra; and Ray v. Blair, supra. See also Republican Party of Connecticut v. Tashjian, 770 F. 2d 265 (2d Cir. 1985); Abrams v. Reno, 452 F. Supp. 1166 (S.D. Fla. 1978) aff'd. 649 F.2d 342 (5th Cir. 1981), cert. denied, 455 U.S. 1016

(1982); Developments in the Law: Elections, 88 Harv. L. Rev. 1111, 1210 (1975). These principles were correctly applied by the Court below when it affirmed the dismissal of Hopfmann's claims.

C. The "15% Rule" Does Not Violate Article I, §4 Of The United States Constitution.

Article I, §4 of the United States Constitution is an affirmative grant of power to the states and not, by itself, a limit on the power of states to regulate elections or to delegate aspects of the candidate selection process to political parties. Nor does it invalidate -- or authorize the invalidation -- of a political party's First and Fourteenth Amendment rights of association. The term "legislature" in Article I, §4 refers to the entire state lawmaking process as construed by that state. Smiley v. Holm, 285 U.S. 355 (1932); Davis v. Hildebrant, 241 U.S.

565 (1961). In Massachusetts, as the Supreme Judicial Court has so held, this lawmaking process also includes political party rules governing ballot access that neither defeat the purpose of a primary election nor violate the institutional rights of candidates or voters. Langone v. Secretary of the Commonwealth, 388 Mass. 185, 193, 446 N.E.2d 43, 47, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983). As held by the Massachusetts Supreme Judicial Court, the "15% Rule" is such a rule and, as such, is a valid and enforceable part of the state lawmaking process. Langone, supra, 388 Mass. at 194, 446 N.E.2d at 48. See also M.G.L. c. 52, § 10 (authorizing party state committees to call conventions). Such a delegation by the state is sanctioned by Article I, §4. Clark v. Rose, 379 F. Supp. 73, 77 (S.D.N.Y. 1974) (three- judge court)

aff'd. 531 F.2d 56 (2nd Cir. 1976). See also Harris v. Conradi, 675 F.2d 1212 (11th Cir. 1982); Tansley v. Grasso, 315 F. Supp. 513 (D. Conn. 1970) (three-judge court) (upholding similar delegation by Connecticut to political parties).

D. The "15% Rule" Does Not Infringe Any Of The Appellants' First Or Fourteenth Amendment Rights

As correctly held by the Massachusetts Supreme Judicial Court in Langone, supra, and by the First Circuit below, the "15% Rule" does not infringe any of the appellants' First or Fourteenth Amendment rights.

A candidate has no fundamental constitutional right to run in a party primary and, potentially, to become that party's nominee. Clements v. Fashing, 457 U.S. 957, reh. denied 458 U.S. 1133 (1982); Bullock v. Carter, 405 U.S. 134, 142-43 (1972); Walker v. Yucht, 352 F.

Supp. 85, 97 (D. Del. 1972) (three-judge court); Developments in the Law: Elections, 88 Harv. L. Rev. 1111, 1176 (1975). Similarly, a voter does not have the constitutional right to expect that a candidate to his liking will be on the ballot. Lubin v. Panish, 415 U.S. 709, 716 (1974); Walker v. Yucht, supra at 92.

Both the state and political parties may constitutionally put reasonable restrictions upon access to primary ballots and, so long as all candidates are equally subject to those requirements and have an equal opportunity to meet them, no constitutional rights of the candidates or their supporters are infringed. Anderson v. Celebreeze, 460 U.S. 780, 788 fn.9 (1983) ("we have upheld generally applicable and even-handed restrictions that protect the integrity and reliability of the electoral process

itself"); Clements v. Fashing, 457 U.S. 957, reh. denied 458 U.S. 1133 (1982). (inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity). See generally Developments in the Law: Elections, 88 Harv. L. Rev. 1111, 1176-77 (1975).

The "15% Rule" has, at most, an insignificant impact on Hopfmann's constitutional rights and any impact it may have is far outweighed by the fundamental interests of the Party which it serves and protects. It does not discriminate against any class of candidates or voters. It does not involve a classification based on wealth. It does not impose a burden on new or small political parties or independent candidates. Nor does it disqualify any candidate from appearing on the general election ballot. In short, as noted by the First Circuit

below, the "15% Rule" does not unfairly or unnecessarily burden the availability of political opportunity, and Hopfmann's claims under the First and Fourteenth Amendments are thus plainly without merit. Anderson v. Celebreeze, 460 U.S. 780, 793 (1983).

Ballot access schemes far more restrictive than those imposed by the "15% Rule" have been upheld against constitutional challenge many times, the closest case being Tansley v. Grasso, 315 F. Supp. 513 (D. Conn. 1970) (three-judge court) in which the constitutional validity of Connecticut's statutory requirement that a prospective candidate receive the support of at least twenty percent of the delegate vote in a party convention, on any roll-call vote, in order to qualify to run in the party primary, was unanimously upheld by the court. See also Storer v. Brown, 415 U.S. 724

(1974); Jenness v. Fortson, 403 U.S. 431 (1971); Rosario v. Rockefeller, 410 U.S. 752 (1973); Restivo v. Conservative Party, 391 F. Supp. 813 (S.D.N.Y. 1975) (upholding a "25%" requirement); Clark v. Rose, 379 F. Supp. 73 (S.D.N.Y. 1974) (three-judge court), aff'd. 531 F.2d 56 (2d Cir. 1976) (upholding a "25%" requirement).

As noted above, five of the seven candidates who submitted their names to the Massachusetts Democratic Party's Endorsing Convention for nomination to the office of lieutenant governor, one of the two candidates for the United States Senate race, and both candidates for the gubernatorial nomination received sufficient votes to qualify for the primary. Thus, the reasonableness of the "15% Rule", and the minimal nature of its requirements, are manifest. Langone, supra, 388 Mass. at 197, 446 N.E.2d at 49.

Finally, when evaluating any of the appellants' constitutional claims (including their Art. I, §3 and Seventeenth Amendment allegations), it is important to remember that ways other than the Democratic Party nomination exist for a candidate to get his or her name on the special election ballot. Hopfmann had the opportunity at any time up until February 4, 1982 to withdraw from the Democratic Party, declare himself an independent candidate, and enlist his supporters in an attempt to secure sufficient signatures on petitions to qualify for the November ballot. M.G.L. c.53, §6. Hopfmann's supporters retained the right to "write in" Hopfmann's name on the November election ballot, and to support other candidates who reflected their political views. M.G.L. c. 54, §§116 and 116A.

At root, under the guise of alleged "constitutional violations",

appellants are asking this Court to order the Democratic Party potentially to endorse a candidate who has not satisfied the party rules and has now chosen to challenge the wishes of a majority of its regular party members. If there are constitutional rights severely at risk, they are those of the regular Democratic Party members who, should this Court invalidate the "15% Rule", may potentially be represented in a general election by a candidate who has no significant support in the active party membership. Hopfmann chose to stay in the Democratic Party rather than become an independent. Having made that choice, he should be required to abide by the "15% Rule." As Judge Cabranes held in Republican Party of Connecticut v. Tashjian, 599 F. Supp. 1228 (D. Conn. 1984), aff'd. 770 F.2d 265 (2d Cir. 1985):

> Absent a malfunctioning of the machinery of the Connecticut Republican party that results in a perversion of its electoral processes, such as the arbitrary exclusion of members of particular ethnic or religious groups, there is no basis for the state to interfere in the party's decision making; the party's internal processes will supply any necessary corrective. Where all persons who share the party's basic philosophy can participate more or less equally in fashioning party rules, there is no reason to set those rules aside merely because a legislative majority thinks it can do a better job.

599 F. Supp. at 1232-33. While the Tashjian court spoke of legislative interference with party rules, its reasoning applies equally to judicial interference. Such interference, absent a "malfunctioning of the party's electoral processes" simply not present here, would violate the party's First Amendment rights of association. See also Ripon Society, Inc. v. National Republican Party, 525 F.2d 567, 585, n. 58 (D.C. Cir. 1975) (en banc), cert

denied, 424 U.S. 933 (1976) ("the [party's] primary purpose is to chart a course for the advancement of the party's ideals and it is in that light that the requirements of equal protection are to be discerned."); Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971), cert. denied, 404 U.S. 1019 (1972); Moritt v. Rockefeller, 346 F. Supp. 34, 38 (S.D.N.Y. 1972) (three-judge court), aff'd. 409 U.S. 1020 (1972).

E. The "15% Rule" Does Not Add Any "Qualification" To Those Enumerated In Article I, §3 Of The United States Constitution And Thus Does Not Violate Its Provisions.

In their Jurisdictional Statement, appellants mischaracterize the "15% Rule" as a "qualification" prohibited by Article I, §3. It is not. It is solely a rule setting a minimal restriction on who may run in the Democratic Party primary for

statewide political office and potentially become the party nominee. The distinction is a critical and decisive one.

The "15% Rule" in no way renders a candidate ineligible for the office of United States Senator. He or she is free to run as an independent, a "write in" candidate, or as the candidate of another political party and, if elected and if he or she meets the "qualifications" set forth in Article I, §3, will be fully "qualified" to take office despite his or her failure to comply with the "15% Rule". A prohibited "qualification" is something entirely different; such a "qualification" would render a candidate completely ineligible to take office even if elected by write-in vote. This critical distinction is highlighted in State v. Crane, 197 P.2d 864 (Wyo. 1948). In that case, at pages 870-71,

the Wyoming Supreme Court correctly notes that the test as to whether or not a "restriction" amounts to a "qualification" within the meaning of Article I, §3 is whether or not the candidate "could be elected if his name were written in by a sufficient number of electors." 197 P.2d at 871.

If Hopfmann's reading of Article I, §3 was correct, no ballot restriction for the office of United States Senator would be constitutionally valid. Under appellants' interpretation of Article I, §3, for example, Massachusetts could not constitutionally require that a candidate for major party nomination for the office of United States Senator must be a member of that party, M.G.L. c. 53, §48; file a financial disclosure form with the state Ethics Commission, M.G.L. c. 53, §9; and submit nominating papers signed by at least 10,000 registered voters, M.G.L.

c. 53, §§44, 46. Hopfmann's interpretation also ignores the rulings of this Court in such cases as Storer v. Brown, 415 U.S. 724 (1974), Jenness v. Fortson, 403 U.S. 431 (1971) and Rosario v. Rockefeller, 410 U.S. 752 (1973), all of which review and uphold ballot access restrictions over and above the "qualifications" set forth in Article I, §3.

F. The "15% Rule" Does Not Violate The Seventeenth Amendment

Hopfmann's last argument, based on the Seventeenth Amendment, appeared for the first time in this litigation in his brief submitted to the First Circuit.

The Seventeenth Amendment, in relevant part, states:

> The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

In no way does the "15% Rule" infringe this Amendment.

At the caucuses which choose delegates to its Endorsing Conventions, the Democratic Party employs precisely the same voter qualifications as does the state, with only one exception; participants at the caucuses must be registered Democrats. Every candidate who desires the Democratic Party's nomination has precisely the same opportunity to get his supporters to those caucuses and, after the caucuses elect delegates to the Endorsing Convention, to solicit those delegates' votes. Moreover, as noted at several points in this Motion, any candidate for the office of United States Senator dissatisfied with the "15% Rule" has the opportunity to run as the candidate of another party, as an independent, or to conduct a "write-in" campaign. The qualifications of voters at the general

election are not affected by the "15% Rule", nor are their votes "diluted", and all candidates, regardless of what party nomination they bear (if any), have precisely the same chance before precisely the same voters. Hopfmann's argument to the contrary, Massachusetts is not a "one-party state" in which nomination by the Democratic Party is tantamount to election. Thus, appellants' belated Seventeenth Amendment arguments must be rejected.

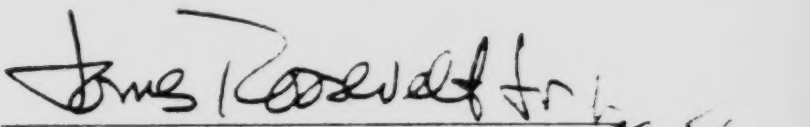
III. CONCLUSION.

The validity of the "15% Rule" and its importance to the Democratic Party have been repeatedly upheld by every Court that has considered its merits. For all of the foregoing reasons, appellees Chester G. Atkins and the Democratic State Committee respectfully request that this Court affirm the judgment of the Court below

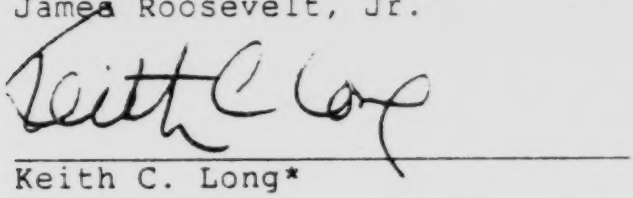
and dismiss appellants' appeal for want of jurisdiction. To the extent appellants' papers are treated as a Petition for Certiorari, appellees respectfully request that that Petition be denied.

CHESTER G. ATKINS and THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS

By their attorneys,



James Roosevelt, Jr.



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Dated: January 24, 1986

APPENDIX A

ARTICLE SIX, SECTION III OF THE CHARTER OF THE MASSACHUSETTS DEMOCRATIC PARTY

Endorsing Convention

There shall be a state convention in even numbered years for the purpose of endorsing candidates for state wide offices in those years in which such office is to be filled. Endorsements for state wide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election.

APPENDIX B

(388 Mass. 185, 446 N.E.2d 43)

Frederick C. LANGONE, et al.1/

v.

SECRETARY OF the COMMONWEALTH, et al.2/

Supreme Judicial Court of Massachusetts, Suffolk.

Argued June 29, 1982.

Decided Feb. 16, 1983.

James F. Kavanough, Jr., Boston (John J. McGivney, Boston, with him), for Frederick C. Langone & others.

Alexander G. Gray, Jr., Asst. Atty. Gen. (Gerald J. Caruso, Asst. Atty. Gen., with him), for the Attorney General, intervener.

David Berman, Medford, for Joel M. Pressman.

1/ Madeline G. Sarno, Victor Grillo, Louis Ferretti, Gail A. Fasano, referred to herein as the Langone supporters, The Langone for Lieutenant Governor Committee, Joel M. Pressman, and plaintiff-intervenor, Francis X. Bellotti, as Attorney General of the Commonwealth.

2/ The Democratic State Committee, Evelyn F. Murphy, Samuel Rotondi, Louis R. Nickinello, John F. Kerry, and Lois E. Pines.

John Kenneth Felter, Boston (Richard A. Oetheimer and Samuel Hoar, Boston, with him) for Secretary of the Commonwealth.

James Roosevelt, Jr., Boston (Keith C. Long, James H. Wexler, Boston, with him), for Democratic State Committee.

William Highgas, Jr., Philip A. Chapman, Jr., Boston, J. Terence Gillan, and David Milstein, for the Governor, amicus curiae, submitted a brief.

Before HENNESSEY, C.J., and WILKINS, LIACOS, ABRAMS, NOLAN, LYNCH and O'CONNOR, J.J.

O'CONNOR, Justice.

Frederick C. Langone, four voters who claimed to be supporters of Langone's candidacy for Lieutenant Governor of the Commonwealth, and The Langone for Lieutenant Governor Committee, brought this action in the Superior Court against the Secretary of the Commonwealth. The complaint alleged that, by refusing to print Langone's name on the September 14, 1982, Democratic State party primary ballot as a candidate for the party's nomination for Lieutenant Governor, the Secretary

deprived the plaintiffs of various rights provided by statutes of the Commonwealth and guaranteed by the United States and Massachusetts Constitutions. An injunction was sought that would have required the Secretary to place Langone's name on the primary ballot. The other defendants, whose names appeared on the primary ballot, and Joel M. Pressman, as plaintiff, were added to the case on the Secretary's motion. The Attorney General intervened as a plaintiff and filed a complaint seeking declaratory relief and an order requiring the Secretary to place the names of Langone, Pressman, and "other candidates who have fully complied with all applicable statutory requirements imposed by G.L. c. 53, on the ballot for the state primary for the Democratic Party, notwithstanding any contrary provision of the party charter."

A single justice of this court allowed a joint "Petition for Transfer" to the Supreme Judicial Court for Suffolk County, and on a motion by all the parties, reserved and reported to the full court the following questions of law:

"1. Whether all candidates who have complied with applicable statutory requirements must appear upon the Democratic state primary ballots, notwithstanding the failure to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth'?

"2. Whether the decision by the Secretary of the Commonwealth that he will not place upon the Democratic state primary ballots those candidates who failed to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth,' but otherwise complied with the statutory requirements to have their names placed upon the ballots violated the constitutional or statutory rights of the voters, the candidates, or their supporters?"

On July 6, 1982, we issued an order that said "[u]pon consideration of

the argument and briefs of the parties, we interpret the State statutes in light of the State and Federal constitutions and rule that the Secretary must give effect to the relevant charter provision. Accordingly, we answer the questions reported, 'No.'" This opinion is an explanation of that order.

On April 23, 1982, the Justices of this court issued an advisory opinion to the Governor. Opinion of the Justices, 385 Mass. 1201, 434 N.E.2d 960 (1982). The first sentence of G.L. c. 53, § 44, as amended through St.1981, c. 278, § 1, states, "The nomination of candidates for nomination at State primaries shall be by nomination papers." There was pending before the Governor for his approval, House Bill No. 5852, which would have added, after that sentence, the following sentence: "Notwithstanding the charter, rule or by-law of a

political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination at the state primary." The proposed language, if constitutional, would have rendered ineffective Article Six, Section III, of the charter of the Democratic party of the Commonwealth of Massachusetts which provides: "There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the

Convention endorsement in a State Primary Election." This is popularly known as the 15% rule. The Justices interpreted the proviso to mean that a convention nominee who fails to receive at least 15% of the convention vote on any ballot is not entitled to have his or her name placed on the primary ballot. Id. at 1025, 434 N.E.2d 960. The Justices advised the Governor that "[i]f House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the Democratic State primary ballot in contravention of the party's charter." Id. at 1207-1208, 434 N.E.2d 960.

On May 21 and 22, 1982, the State Democratic party held its convention for the purpose of endorsing its candidates for statewide office. The defendants

Murphy, Rotondi, Kerry, Pines, and Nickinello received at least 15% of the convention vote cast on one or more ballots. The plaintiffs Langone and Pressman failed to obtain at least 15% of vote on any ballot. On May 25, 1982, the chairman of the Democratic State Committee sent a certified copy of the party charter to the Secretary and gave him the names of those individuals who had obtained at least 15% of the vote on one or more ballots, the Secretary released a statement that pursuant to the April 23 Opinion of the Justices, supra, he would be unable to place on the State primary ballot the names of Langone and Pressman although they had filed valid nomination papers. On the following day the Director of Elections sent letters to Langone and Pressman containing the same information. This action was commenced on June 2, 1982.

Candidates of political parties for statewide office in this Commonwealth are nominated at primaries held for that purpose. G.L. c. 53, §§ 2, 41. General Laws c. 53 provides several requirements for primary ballot access, including requirements that only persons certified as enrolled members of a political party may be candidates for that party's nomination, § 48, and that candidates for the nomination of a political party must file nomination papers containing at least 10,000 certified voter signatures. G.L. c. 53, § 44.3/ General Laws c. 53, § 44, further provides that "[t]he nomination of candidates for nomination at state primaries shall be by nomination

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3/ Both Langone and Pressman had complied with the requirements of G.L. c. 53, § 44, by filing nomination papers containing more than 10,000 certified voter signatures.

papers," and § 2, as appearing in St.1975, c. 600, § 7, provides that "[n]o candidates shall be nominated . . . in any other manner than is provided in this chapter or chapter fifty-two."4/ These several sections of G.L. c. 53 may reasonably be construed in two ways: as providing the only requirements for primary ballot access, excluding all others, or, in the alternative, as providing minimum requirements for primary ballot access but permitting imposition by the party of additional requirements that are consistent with a primary election system and do not infringe the constitutional rights of candidates and voters. Under the first construction, a candidate who satisfies the express statutory requirements would have a

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4/ General Laws, c. 52 is irrelevant to the present inquiry.

right to the printing of his or her name on the primary ballot. Under the second construction, compliance with the express statutory requirements would not entitle candidates to appear on the ballot in the absence of compliance with the party rule also. If we were to adopt the first construction, we think that G.L. c. 53 would be unconstitutional. However, we think that, since the provisions of G.L. c. 53 are not expressly preemptive, the second construction is permitted by reasonable principles of construction and would avoid constitutional difficulties. Therefore, we adopt it. "It is our duty to construe statutes so as to avoid . . . constitutional difficulties, if reasonable principles of interpretation permit it." School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 79-80, 431 N.E.2d 180 (1982). Staman v. Assessors of Chatham, 351 Mass. 479,

486-487, 221 N.E.2d 861 (1966). We discuss below our reasons for concluding that constitutional considerations require the second construction of G.L. c. 53.

In Opinion of the Justices, 385 Mass. at 1204, 434 N.E.2d 960, the Justices stated that the right to associate with the political party of one's choice is an integral part of the freedom of association for the advancement of common political beliefs protected by the First and Fourteenth Amendments to the Constitution of the United States. Kusper v. Pontikes, 414 U.S. 51, 56-57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973). The Justices further stated that there is implicit in that freedom a political party's substantial interest in ensuring that party members have an effective role in determining who will appear on a general election ballot as that party's

candidate, citing Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981). The Justices noted that the winner by a plurality of a party primary in this Commonwealth becomes that party's candidate in the general election, and that voting in the party primary is open both to voters who are enrolled as party members before the primary and to those who are unenrolled until they request that party's ballot at the polls. G.L. c. 53, § 37. They noted also that the registered voters who sign nomination papers need not be members of the party. G.L. c. 53, § 46. It followed that if the only requirements for primary ballot access were the existing Massachusetts statutory requirements unaugmented by party rule, "a candidate for statewide election could be placed on the Democratic party ballot and win the primary, thus becoming entitled to

be placed on the general election ballot as the Democratic party candidate, with little or no support from the regular party membership." Id. 385 Mass. at 1205, 434 N.E.2d 960. The Justices concluded that this would substantially infringe the Democratic party's right of freedom of association, id. at 1206, 434 N.E.2d 960, and that the Commonwealth's interest in the integrity of the election process does not constitutionally justify elimination of party control over who the party's candidate in the general election will be. Id. at 1207, 434 N.E.2d 960.

In answering the questions reported by the single justice in the case before us, we recognized that advisory opinions, "although necessarily the result of judicial examination and deliberation, are advisory in nature, . . . not adjudications by the court, and do not fall within the doctrine of

stare decisis." Commonwealth v. Welosky, 276 Mass. 398, 400, 117 N.E.656, cert. denied, 284 U.S. 684, 52 S.Ct. 201, 76 L.Ed. 578 (1931). "In accordance with our duty, we examine[d] the [questions reported by the single justice] anew, unaffected by the advisory opinion." Lincoln v. Secretary of the Commonwealth, 326 Mass. 313, 314, 93 N.E.2d 744 (1950). We were aided in that effort by the oral arguments and briefs of the parties. We again concluded that G.L. c. 53 would substantially infringe the Democratic party's fundamental right of association if it eliminated the 15% rule, thus necessitating strict scrutiny, which it does not survive. Bachrach v. Secretary of the Commonwealth, 382 Mass. 268, ___, Mass. Adv. Sh. (1981) 93, 101, 415 N.E.2d 832. More of an intrusion on the party's fundamental right of association than is required to protect the

Commonwealth's compelling interest in the integrity of the election process, American Party of Texas v. White, 415 U.S. 767, 783, 94 S.Ct. 1296, 1307, 39 L.Ed.2d 744 (1974), Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973), Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973), is not constitutionally permissible. See Riddell v. National Democratic Party, 508 F.2d 770, 776-778 (5th Cir. 1975). The Commonwealth's interest in the integrity of the election process does not require, and therefore does not permit, preclusion of a party rule that reserves to its convention delegates the right to bar from the party's primary ballot candidates who lack the support of at least 15% of those delegates on any convention ballot.

In Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 101 S.Ct. 1010,

67 L.Ed.2d 82 (1981), the United States Supreme Court struck down a State statute that compelled the Democratic party, contrary to national party rules, to seat delegates at its national convention who were bound by the statute to vote on the first ballot in accordance with the results of an open primary. An open primary is one in which any registered voter can participate regardless of party affiliation and without publicly declaring it. The plaintiffs argue that Democratic Party of U.S. v. Wisconsin, supra, stands only for the proposition that a State may not interfere with the internal affairs of a national political party, such as the naming of the party's delegates to its national convention. We think that the principle enunciated in that case is not so narrow. The Court phrased the question before it as "whether, once Wisconsin has opened its

Democratic Presidential preference primary to voters who do not publicly declare their party affiliation, it may then bind the National Party to honor the binding primary results, even though those results were reached in a manner contrary to National Party rules." Id. at 120, 101 S.Ct. at 1018. Reasoning that "the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions - thus impairing the party's essential functions - and that political parties may accordingly protect themselves 'from intrusion by those with adverse political principles," Ray v. Blair, 343 U.S. 214, 221-222 [72 S.Ct. 654, 657-658, 96 L.Ed. 894 [1952]," id. at 122, 101 S.Ct. at 1019, the Court held that "if Wisconsin . . . open[s] its primary, it cannot require that Wisconsin delegates to the National Party Convention vote there in

accordance with the primary results, if to do so would violate Party rules." Id. at 126, 101 S.Ct. at 1021. To be sure, the Court declared that the Wisconsin statute impermissibly interfered with the party's internal affairs, as the plaintiffs point out, but it is significant that the Court's focus was on the nature of the interference, which was the imposition on the party of convention votes for the party's presidential nominee that may not have reflected the choice of party members.

In order to vote at a Massachusetts primary, an unenrolled voter may enroll in a political party at the polling place immediately before voting, and receive that party's ballot. G.L. c. 53, § 37. The voter may become unenrolled again, or change his or her enrollment on the day following the primary. G.L. c. 53, § 38. This

section also provides that at primaries a clerk shall make available within the polling place certificates to enable a voter to make such changes. Since these provisions require that part affiliation be publicly declared, the Massachusetts primary is not technically "open" as was the Wisconsin primary in Democratic Party of U.S. v. Wisconsin, supra, but the availability of party affiliation to unenrolled voters, which can be little more than momentary and may be for a purpose that is entirely inconsistent with, or at least unsupportive of the principles of the party, blurs any meaningful distinction between open and closed primaries. See Democratic Party of U.S. v. Wisconsin, supra 450 U.S. at 133, 101 S.Ct. at 1024 (Powell, J., with whom Blackmun and Rehnquist, JJ., joined, dissenting). Such affiliation demonstrates neither commitment to, nor acceptance of, the political, social,

and economic philosophies and programs for which the party has organized. "[A] political party has a legitimate -- indeed, compelling -- interest in ensuring that its selection process accurately reflects the collective voice of those who, in some meaningful sense, are affiliated with it. Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being" (emphasis added). L. Tribe, American Constitutional Law 791 (1978).

Since nomination papers may be signed by unenrolled voters, G.L. c. 53, § 46, and since voters at the primary may have only a tenuous affiliation with the party, c. 53, § 37, if G.L. c. 53 nullifies a party rule requiring that a candidate for nomination have a modicum

of support from members with substantial affiliation with the party, it as effectively eliminates that party's control of who its candidates in general elections will be as did the Wisconsin statute held unconstitutional in Democratic Party of U.S. v. Wisconsin, supra. We view this as a substantial interference with the fundamental rights of association guaranteed to the party and its members by the First and Fourteenth Amendments. Therefore, we reject a construction of G.L. c. 53 that would render ineffective all party rules governing primary ballot access, and we construe the statute as permitting any such rule that neither defeats the purpose of a primary election system nor violates the constitutional rights of candidates or voters.

We turn to a consideration whether a construction of G.L. c. 53 as recognizing the Democratic party's 15%

rule would defeat the legislative purpose in providing for primary elections, and we conclude that it would not. The aim of the primary system is the encouragement of wide participation in politics and discouragement of candidate selection by party bosses. Democratic Party of U.S. v. Wisconsin, supra at 127, 101 S.Ct. at 1021 (Powell, J., with whom Blackmun and Rehnquist, JJ., joined, dissenting). Popular participation in the candidate selection process is assured by G.L. c. 53, § 44, requiring nomination papers signed by at least 10,000 registered voters, and by c. 53, § 37, which provides that primary votes may be cast by persons who are unenrolled until they go to the polls. This broad citizen participation is not negated by application of the 15% rule. The fact that five candidates for selection as the Democratic party's candidate for Lieutenant Governor

received sufficient delegate support to satisfy the party charter requirement warrants the inference that the selection process was not dominated by party bosses. The 15% rule does not defeat the legislative purpose in adopting a primary system. We need not consider at what point the legislative purpose would be defeated by a different party rule requiring a higher percentage of delegate support.

Primary elections are the creatures of statute and are an integral part of the election process. United States v. Classic, 313 U.S. 299, 314, 61 S.Ct.. 1031, 1037, 85 L.Ed. 1368 (1941). Enforcement by the Commonwealth of the 15% rule is State action and is, therefore, subject to constitutional scrutiny. Bullock v. Carter, 405 U.S. 134, 140, 92 S.Ct. 849, 854, 31 L.Ed.2d 92 (1972). Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152

(1953). Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932). Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927). See L. Tribe, American Constitutional Law 787 (1978). 5/ For the purpose of evaluating the plaintiffs' claims that the 15% rule violates rights guaranteed to them by the Federal and State Constitutions, we treat the rule as though it were expressly contained in G.L. c. 53. See

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5/ We have recently held that the protection of art. 9 of the Massachusetts Declaration of Rights is not from State action alone. Batchelder v. Allied Stores Intl., Inc., 388 Mass. 83, 88, 445 N.E.2d 590 (1983). But since we find state action present, we need not decide whether that case negates the necessity of State action under our State Constitution.

L. Tribe, American Constitutional Law 790 n. 2 (1978).

We have concluded that G.L. c. 53 would violate the constitutional rights of the Democratic party and its members if it were to exclude every form of primary ballot access control by party members with a more substantial party affiliation than is demonstrated by accepting a Democratic party ballot on primary election day. We have also concluded that enforcement of the 15% rule would not defeat the legislative purpose in adopting a primary system. We must further inquire whether G.L. c. 53, as augmented by the 15% rule, would deprive the plaintiff candidates or voters of rights of free speech and association guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States and arts. 1, 16, and 19 of the Massachusetts Declaration of Rights, or would violate

their rights to equal protection secured by the Fourteenth Amendment or their rights to freedom and equality of elections secured by art. 9 of the Declaration of Rights. The same basic issues relative to the United States Constitution must be addressed whether our analysis be in First Amendment or equal protection terms.

The first question to be resolved is whether State enforcement of the 15% rule must withstand strict scrutiny or only a rational basis test. Strict scrutiny is required if the interests asserted by the plaintiffs are fundamental and the infringement of them is substantial. Bullock v. Carter, 405 U.S. 134, 142-144, 92 S.Ct. 849, 855-856, 31 L.Ed.2d 92 (1972). In that event, the 15% rule must serve a compelling State interest with as little infringement as possible in order to be constitutionally permissible. Bachrach

v. Secretary of the Commonwealth, 382 Mass. 268, ____, Mass.Adv.Sh. (1981) 93, 101, 415 N.E.2d 832. On the other hand, if the asserted interests are not fundamental or the impact on them of the 15% rule is not substantial, State enforcement of the rule is constitutional if it is rationally based. Bullock v. Carter, supra.

Langone and Pressman assert that enforcement of the 15% rule abridges their rights of candidacy, and the Langone supporters and the Langone Committee assert interference with their rights as voters. Although the right to run for public office may not be a fundamental right, see Bullock v. Carter, supra 405 U.S. at 142-143, 92 S.Ct at 855, but see Mancuso v. Loft, 476 F.2d 187, 195 (1st Cir.1973), and it clearly is not absolute, Opinion of the Justices, 375 Mass. 795, 811, 376 N.E.2d 810 (1978), the right to vote is

fundamental, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667, 86 S.Ct. 1079, 1081, 16 L.Ed.2d 169 (1966), Reynolds v. Sims, 377 U.S. 533, 561-562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964), see Sears v. Secretary of the Commonwealth, 369 Mass. 392, 399, 341 N.E.2d 264 (1975), and restrictions on the access of candidates to the ballot inevitably have impact on voters' rights. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184, 99 S.Ct. 983, 990, 59 L.Ed.2d 230 (1979). Lubin v. Panish, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974). Bullock v. Carter, supra 405 U.S. at 143, 92 S.Ct at 855. Therefore, we treat the interests asserted by the candidates, as well as those asserted by the voter plaintiffs, as fundamental.

A determination whether the restrictions on primary ballot access resulting from the application of G.L.

c. 53, and the 15% rule have a sufficient impact on the plaintiffs' fundamental interests to compel strict scrutiny, requires an examination of that impact "in a realistic light." Bullock v. Carter, supra at 143, 92 S.Ct. at 855. Clough v. Guzzi, 416 F.Supp. 1057, 1066 (D.Mass.1976). We are satisfied that the burden on candidacy and voting rights that results from enforcement of the 15% rule is insufficient to warrant strict scrutiny and that the appropriate inquiry is whether the effect of G.L. c. 53, supplemented by the 15% rule, is rationally related to the furtherance of legitimate state interests. See Storer v. Brown, 415 U.S. 724, 733-736 & n. 7, 94 S.Ct. 1274, 1280-1282 & n. 76, 39 L.Ed.2d 714 (1974)(statute disqualifying independent candidate who was registered member of any party within one year prior to primary election, valid);

Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971) (independent candidates required to submit petition with signatures of 5% of the eligible voters).

We begin our examination of the impact of the 15% rule with the observation that discrimination between those who gain the support of at least 15% of the convention delegates and those who do not is not invidious. Enforcement of the 15% rule does not deny candidates access to the primary ballot in an unfair way, such as by imposing prohibitive filing fees. See Bullock v. Carter, supra. Everyone who seeks to have his or her name printed on the Democratic primary ballot has the same opportunity to gather the necessary signatures and convention support. No one is required to obtain a greater percentage of the delegate votes than anyone else. That reasonable

opportunity exists to garner the necessary delegate support is demonstrated by the fact that five candidates for the Democratic nomination for Lieutenant Governor did so.

Participation in a primary is not the only route available to the plaintiffs to enable them to associate and express political ideas. Bachrach v. Secretary of the Commonwealth, 382 Mass. 268, 415 N.E.2d 832 (1981). A candidate for statewide office is entitled to appear on the general ballot as an independent by compliance with the provisions of G.L. c. 53, § 6. To the extent, however, that the plaintiffs wish to associate and express their ideas as Democrats, those ideas may be represented by several candidates who obtained the requisite convention support. Every voter cannot be assured that a candidate to his liking will be

on the ballot. Lubin v. Panish, supra 415 U.S. at 716, 94 S.Ct at 1320. "So long as the ideas in which a potential candidate and other party members believe can be represented by another candidate, the primary purpose of political association has been served. A candidate may, of course, prefer to be the party nominee, but judicial cognizance of that interest as an element of associational rights would be merely a backdoor way of establishing [an absolute] right to candidacy." Developments in the Law -- Elections, 88 Harv.L.Rev. 1111, 1176, 1177 (1975).

Not only does the Commonwealth have a legitimate interest in protecting the constitutional rights of the Democratic party and its members to associate, see South Carolina v. Katzenbach, 383 U.S. 301, 327, 86 S.Ct. 803, 818, 15 L.Ed.2d 769 (1966), but it also has a proper

interest "in maintaining the integrity and stability of existing political parties, thus encouraging responsible action on their part." Tansley v. Grasso, 315 F.Supp. 513, 517 (D.Conn.1970). This interest is served by assuring that candidates who appear on the general election ballot as representatives of the Democratic party are truly representative of the party as demonstrated by the support of at least 15% of the party's convention delegates on one or more convention ballots. "The preservation of the integrity of the various routes to the ballot is a proper State objective." Opinion of the Justices, 368 Mass. 819, 823, 333 N.E.2d 380 (1975). We conclude, therefore, that G.L. c. 53, supplemented by the 15% rule, is rationally related to legitimate State interests and does not violate any rights guaranteed to the

plaintiffs by the United States Constitution. 6/

Although the plantiffs claim that State implementation of the 15% rule would violate rights guaranteed to them by arts. 1, 9, 16, and 19 of the Massachusetts Declaration of Rights, 7/

6/ Langone contends that he had insufficient notice of the requirements for primary ballot access and that therefore his right to due process guaranteed by the Fourteenth Amendment was violated by the failure of the Secretary to print his name on the primary ballot. This contention is without merit. In December, 1981, the Democratic party issued its "Preliminary Call to Convention," which gave clear notice that the party would be holding its endorsing convention pursuant to Article Six of the party's charter. Any assumption that G.L. c. 53 provided the exclusive requirements for primary ballot access was unwarranted.

7/ These articles of the Massachusetts Declaration of Rights state:

Article 1, as appearing in art. 106 of the Amendments to the Massachusetts Constitution,

they advance no separate reasons, and we are unaware of any, to conclude that the Massachusetts Constitution affords them protection not provided by the First and Fourteenth Amendments of the United States Constitution. We have previously said that the freedoms protected by arts. 16 and 19 are "comparable to those guaranteed by the First Amendment."

7/ (continued) - provides: "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

Article 9 provides: "All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments."

First Nat'l. Bank v. Attorney Gen., 371 Mass. 773, 792, 359 N.E.2d 1262 (1977), rev'd on other grounds 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 249, 69 N.E.2d 115 (1946). The Justices have said that "[t]he Massachusetts Constitution does not refer to primaries as such, but concerns itself only with elections." Opinion of

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7/ (continued)

Article 16, as appearing in art. 77 of the Amendments to the Massachusetts Constitution, provides: "The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this Commonwealth. The right of free speech shall not be abridged."

Article 19 provides: "the people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good: give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."

the Justices, 359 Mass. 775, 776-777, 268 N.E.2d 159 (1971). Even if the Massachusetts Constitution were to apply to primaries because of their effect on general elections, "the right 'to be elected,' preserved in art. 9, is not absolute. It is subject to legislation reasonably necessary to achieve legitimate public objectives." Opinion of the Justices, 375 Mass. 795, 811, 376 N.E.2d. 810 (1978). See Opinion of the Justices, 368 Mass. 819, 823, 333 N.E.2d 380 (1975).

Thus, we have completed the constitutional analysis which requires that we construe G.L. c. 53 not to exclude, but rather, to accommodate the 15% rule. No candidate who fails to obtain at least 15% of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III, of the "Charter of the Democratic Party of

the Commonwealth" must appear on the Democratic State primary ballot. The decision of the Secretary of the Commonwealth to that effect did not violate the constitutional or statutory rights of the voters, candidates, or candidates' supporters.

APPENDIX C

(746 F.2d 97)

Alwin E. HOPFMANN, et al.,

Plaintiffs, Appellants,

v.

Michael Joseph CONNOLLY, et al.,

Defendants, Appellees.

No. 84-1317.

United States Court of Appeals,
First Circuit.

Argued Sept. 10, 1984.

Decided Oct. 22, 1984.

Rehearing and Rehearing En Banc Denied
Dec. 10, 1984.

Lawrence J. Ball, Detroit, Mich., with whom Stephen P. Dowd, Laurence Elgin, James F. Schoener, Miller, Canfield, Paddock & Stone, Detroit, Mich., were on brief, for plaintiffs, appellants.

Alexander G. Gray, Jr., Asst. Atty. Gen., with whom Francis X. Bellotti, Atty. Gen., Boston, Mass. was on brief, for Michael Joseph Connolly Francis X. Bellotti, defendants, appellees.

Keith C. Long, Boston, Mass., with whom James Roosevelt, Jr., James H. Wexler, and Herrick & Smith, Boston, Mass., were on brief, for Chester G. Atkins and the Democratic State Committee of Massachusetts, defendants, appellees.

Before CAMPBELL, Chief Judge, COWEN,* Senior Circuit Judge, and BOWNES, Circuit Judge.

COWEN, Senior Circuit Judge.

This is an appeal from an order of the District Court for the District of Massachusetts which dismissed appellants' (plaintiffs') complaint. The principal plaintiff, Alwin E. Hopfmann, was an unsuccessful candidate for the Democratic nomination for the office of United States Senator in 1982. He, and four individuals who desired to vote for him, brought this action in the district court against the Secretary of the Commonwealth of Massachusetts. The Attorney General of the Commonwealth of Massachusetts, the Chairman of the Democratic Party of the Commonwealth of Massachusetts, and the Democratic State Committee of Massachusetts (defendants). Plaintiffs sought injunctive and declaratory

relief, claiming that a cornucopia of constitutional rights were violated when Hopfmann's name was excluded from the ballot in the Democratic primary. For the reasons to be set forth, we affirm the decision of the district court.

I.

This action is basically an attack on the constitutionality and validity of Article Six, Section III of the Charter of the Massachusetts Democratic Party (the 15 percent rule), which provides that only those candidates who receive 15 percent of the vote on any ballot at the convention may challenge the convention's endorsement in a state primary election. In 1982, Hopfmann failed to obtain 15 percent of the vote and the Secretary of the Commonwealth of Massachusetts ordered his name excluded from the primary ballot. The filing of the complaint followed this action.

After the filing of the complaint, defendants filed motions to dismiss. On June 24, 1982, proceedings were stayed pending the decision of the Massachusetts Supreme Judicial Court in the related proceeding of Langone v. Secretary of the Commonwealth. A three-judge panel was convened to consider the issues, brought under the Voting Rights Act, 42 U.S.C. § 1973 et seq., and on July 7, 1982, the panel denied preliminary relief on the claim. On July 8, 1982, plaintiffs' application, seeking a stay of the denial of preliminary relief and an order directing the Secretary of the Commonwealth to place Hopfmann's name on the Democratic ballot, was denied by Justice Brennan. After resubmittal, it was denied by Justice Rehnquist on July 9, 1982. Hopfmann's petition for a writ of habeas corpus (requesting that his name be placed on the Democratic

primary ballot) filed September 20, 1982, was denied by the full United States Supreme Court on October 18, 1982. Plaintiffs' petition for a writ of prohibition and/or mandamus and/or injunction, requesting that Hopfmann's name be placed on the Democratic primary ballot, filed September 30, 1982, was denied by the United States Supreme Court on November 29, 1982. Plaintiffs' application, filed October 25, 1982, seeking a stay of the general election or, in the alternative, a special primary election, was denied by Justice Brennan on October 26, 1982. After resubmittal, it was again denied, by the full United States Supreme Court, on November 1, 1982. Plaintiffs' applications, filed November 5, 1982, to enjoin the Governor of Massachusetts from certifying the election of Senator Edward M. Kennedy, and the United States Senate from seating him, were also

denied by the United States Supreme Court.

A copy of the opinion of the Massachusetts Supreme Judicial Court in Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446 N.E.2d 43 (1983), was filed with the district court on February 23, 1983. On April 8, 1983, a copy of the order of the United States Supreme Court, dismissing the appeal in that case and denying the alternative petition for certiorari was filed with the district court. Langone v. Connolly, 160 U.S. 1057, 103 S.Ct. 1510, 75 L.Ed.2d 938 (1983).

On April 9, 1984, the district court, treating defendants' motions to dismiss as motions for summary judgment, granted them and dismissed the complaint.

II.

Here, as in the court below, plaintiffs' principal attack on the 15 percent rule is the contention that the

enforcement of the rule violates their rights under the First and Fourteenth Amendments to the United States Constitution. The parties are agreed that Hopfmann had complied with the state statutory requirement (Mass. G.L. c. 53) for having his name placed on the primary ballot. To comply with state requirements, candidates must submit nomination papers signed by 10,000 voters. Specifically, plaintiffs argue that since this statutory requirement had been met, the denial of Hopfmann's access to the ballot in the primary election and the deprivation of the rights of the remaining parties to participate in choosing the party's candidates, abridged rights guaranteed to them by the First and Fourteenth Amendments.

As stated above, proceedings in the district court were stayed pending the decision in Langone v. Secretary of the

Commonwealth, supra, which was decided February 16, 1983. Contrary to plaintiffs' position in this appeal, the Supreme Judicial Court of Massachusetts held in that case that G.L. c. 53 incorporated the 15 percent rule, and that the rule did not deprive candidates or voters of their rights of free speech, association, due process, or equal protection guaranteed to them by the First and Fourteenth Amendments of the United States Constitution. The United States Supreme Court summarily dismissed the appeal from that decision for want of jurisdiction in April, 1983. Langone v. Connolly, supra. The district court's decision in this case was largely based on the decision of the Supreme Judicial Court and the dismissal of the appeal in that case by the United States Supreme Court.

Relying on Hicks v. Miranda, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975), defendants urge that the dismissal of the appeal by the United States Supreme Court for lack of jurisdiction, i.e., for want of a substantial federal question, is a decision on the merits which is binding on this court and is dispositive of the First and Fourteenth Amendment claims. Citing Maryland v. Baltimore Radio Show, 338 U.S. 912, 919, 70 S.Ct. 252, 255, 94 L.Ed. 562 (1950), plaintiffs respond that it is not clear that the Supreme Court's decision was a dismissal of the appeal, and instead, may be construed as a denial of the petition for certiorari. Consequently, they argue that the decision has no precedential value in this court.

We agree with the contentions of defendants. In Langone v. Connolly,

the appellants couched their jurisdictional statement in the alternative, requesting that the statement be treated as an appeal under 28 U.S.C. § 1257(2), and to the extent that the statement would not be considered an appeal under that subsection, they requested that it be treated as a petition for certiorari under 28 U.S.C. § 1257(3). The order of dismissal of the United States Supreme Court stated:

> The appeals are dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied. [Emphasis added.]

We find that the circumstances in Langone v. Connolly show that plaintiffs' application to the United States Supreme Court was treated as an appeal under 28 U.S.C. § 1257(2) and dismissed. The dissent of Justice Stevens, in which Justice Rehnquist and

Justice O'Connor joined, leads us to that conclusion. The dissent of Justice Stevens stated in part:

> These appeals present substantial, unresolved questions regarding the accommodation of competing First Amendment values: the interests of would-be candidates and voters in eligibility for the ballot, and the interests of party members in political association without undue governmental intrusion. * * *
>
> The case is properly before this Court on appeal.
>
> * * * *

460 U.S. at 1057 and 1058, 103 S.Ct. at 1510 and 1511, 75 L.Ed.2d at 938 and 939. The language in the majority's dismissal of the petition is understandable when read in conjunction with appellants' jurisdictional statement. We think that the majority of the Supreme Court was taking an extra precaution to deny the application in toto, since the order stated that the appeal was dismissed for lack of

jurisdiction, but that if the papers were treated as a petition for certiorari, the petition was also denied.

In holding that the decision of the United States Supreme Court in Langone v. Connolly is final and binding, we are mindful of Justice Brennan's concurring opinion in Mandell v. Bradley, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977), giving narrow scope to summary dispositions by the United States Supreme Court. In pertinent part, that opinion states:

> After today, judges of the state and federal systems are on notice that before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions were the same and if they were, (b) determine that the judgment in fact rests upon decision of those questions, not even arguably upon some alternative nonconstitutional ground. The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is

plausible. [432 U.S. at 180, 97 S.Ct. at 2242.]

An examination of the appellants' jurisdictional statement clearly shows that the same constitutional questions which are raised by plaintiffs' First and Fourteenth Amendment claims in this case, were at issue in Langone v. Secretary of the Commonwealth, and that the judgment of the court in that case rested upon a decision of those constitutional questions.

III.

Plaintiffs maintain that even if this court holds that the United States Supreme Court action in Langone v. Connolly is dispositive of their First and Fourteenth Amendment claims, they are still entitled to prevail, because the enforcement of the 15 percent rule violates Article 1, Section 4, Clause 1, Article I, Section 3, Clause 3, and the

Seventeenth Amendment of the Constitution.

We consider the claim based on Article I, Section 4, Clause 1. This clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing [sic] Senators.

According to plaintiffs, this provision mandates that the state legislatures alone may prescribe the conditions under which elections are held. Therefore, they declare that the imposition of any conditions on elections for the United States Senate by any entity other than the state legislature, such as the Democratic Party through the 15 percent rule, is an unlawful usurpation of the state legislature's constitutional prerogative.

This argument reaches too far. Plaintiffs' theory rests on the proposition that no power to impose restrictions on regular or primary elections may be delegated to political parties by the state legislature. Such an extreme interpretation, if adopted with respect to primary elections, could effectively destroy the ability of political parties to select members of their own choice - a right implicit in the freedom of association guaranteed by the First and Fourteenth Amendments of the Constitution. See Rodriguez v. Popular Democratic Party, 457 U.S. 1, 102 S.Ct. 2194, 72 L.Ed.2d 628 (1982); Democratic Party of the United States v. Wisconsin, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981); Cousins v. Wigoda, 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975).

The potential for interference with the State Democratic Party's ability to

select the candidate of its members' choice is apparent from the statutory rules governing primary elections in Massachusetts. These rules provide that nomination papers for the primary ballot may be signed by 10,000 registered voters, whether or not they are enrolled party members, G.L. c. 53 § 46, and that both enrolled party members and unenrolled registered voters may vote in the primaries, as long as they enroll at the polls just before receiving ballots. G.L. c. 53, § 37. Thus, as was pointed out in Langone v. Secretary of the Commonwealth, 446 N.E.2d at 46:

> * * * if the only requirements for primary ballot access were the existing Massachusetts statutory requirements unaugmented by party rule, "a candidate for statewide election could be placed on the Democratic party ballot and win the primary, thus becoming entitled to be placed on the general election ballot as the Democratic party candidate, with little or no support from the regular party membership." Id. [Opinion of the Justices to the Governor.] 385 Mass. [1201] at

> 1205, 434 N.E.2d 960 [(1982)]. The justices concluded that this would substantially infringe the Democratic party's right of freedom of association, id. at 1206, 434 N.E.2d at 960, and the Commonwealth's interest in the integrity of the election process does not constitutionally justify elimination of party control over who the party's candidates in the general election will be.

In that case, the Supreme Judicial Court of Massachusetts construed G.L. c. 53 as "not to exclude, but rather to accommodate the 15 percent rule." 446 N.E.2d at 51.

Plaintiffs' interpretation of Article I, Section 4 also runs contrary to other decisions on the point, which have found it unobjectionable for state legislatures to delegate some of their regulatory authority over primary election balloting to state political parties. Skeen v. Hooper, 631 F.2d 707 (10th Cir. 1980); Tansley v. Grasso, 315 F.Supp. 513 (D.Conn. 1970); Clark v. Rose, 379 F.Supp. 73, 77 (S.D.N.Y. 1974).

Accordingly, we hold that the 15 percent rule represents merely a rule promulgated by authority which has been delegated by the state legislature, and is in no way violative of Article I, Section 4 of the Constitution.

IV.

Plaintiffs next argue that the application of the 15 percent rule transgresses Article I, Section 3, Clause 3 of the Constitution in that it unlawfully adds a qualification for the office of United States Senator beyond the age, citizenship and residency requirements of the Constitution.

As the defendants have correctly pointed out, the 15 percent rule does not add a qualification that precludes Hopfmann from obtaining the office of United States Senator. The rule merely adds a restriction on who may run in the Democratic party primary for statewide

political office and potentially become the party nominee. The cases cited by plaintiffs to the effect that neither Congress nor the states can add to the constitutional qualifications for office are inapposite. Cf. Powell v. McCormack, 395 U.S. 486, 547, 551, 89 S.Ct. 1944, 1977, 1979, 23 L.Ed.2d 491 (1969).

Unlike the additional requirements involved in the cases cited by plaintiffs, failure to comply with the 15 percent rule does not render a candidate ineligible for the office of United States Senator. An individual is free to run as the candidate of another party, as an independent, or as a write-in candidate. If he is elected and meets the requirements of Article I, Section 3, he will be qualified to take office. As the Wyoming Supreme Court stated in State v. Crane, 197 P.2d 864,

871 (Wyo. 1948), the test to determine whether or not the "restriction" amounts to a "qualification" within the meaning of Article I, Section 3, is whether the candidate "could be elected if his name were written in by a sufficient number of electors."

If plaintiffs' position were accepted, it would invalidate most of the state regulatory statutes, such as G.L. c. 53, which also restricts ballot access by requiring, among other things, that each candidate must submit nominating papers signed by at least 10,000 registered voters. Similar statutes have been upheld by the Supreme Court as an adjunct to the states' regulatory powers under the "time, place, and manner" clause of Article I, Section 4, in order to insure that "some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730, 94

S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974); see also Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973).

We therefore conclude that the 15 percent rule cannot be said to violate Article I, Section 3, Clause 3.

V.

Plaintiffs' final contention is that the 15 percent rule violates the Seventeenth Amendment to the Constitution, which provides in pertinent part:

> The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Plaintiffs insist that the 15 percent rule contravenes this provision because the rule applies only to candidates for statewide office, whereas the election of state representatives is not governed by the rule.

This contention was not raised below by plaintiffs, and is not properly before this court. See Johnson v. Allyn & Bacon, Inc., 731 F.2d 64, 73 (1st Cir. 1984); Johnston v. Holiday Inns, Inc., 595 F.2d 890, 894 (1st Cir. 1979).

However, if it is assumed arguendo that the contention is properly before us, we find that it is entirely lacking in merit. The 15 percent rule does not impose a qualification on voters for participation in elections for United States Senator which does not apply to voters in elections for representatives in the state legislature. As previously stated in this opinion, the 15 percent rule only imposes a restriction on those who wish to participate in the primary of the Democratic party and to obtain that party's nomination, whether they be candidates for the United States Senate or for the lower house of the state

legislature. We repeat that any individual who fails to meet the requirements of or is dissatisfied with the 15 percent rule has the opportunity to run as a candidate of another party, as an independent, or to conduct a write-in campaign. Forssenius v. Harmon, 235 F.Supp. 66 (E.D.Va. 1964), relied on by plaintiffs, is inapposite. In that case, the state statute provided that no voter would be entitled to vote in any federal election unless he offered proof of continuing residence by filing a certificate in the time and manner prescribed by the state law.

AFFIRMED.

APPENDIX D

(__U.S.__, 105 S. Ct. 2106)

SUPREME COURT OF THE UNITED STATES

ALWIN E. HOPFMANN, ET AL. v.
MICHAEL JOSEPH CONNOLLY, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1440. Decided May 13, 1985

PER CURIAM.

Appeal from the United States Court of Appeals for the First Circuit is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, the petition is granted.

Hopfmann filed this action in the Federal District Court for the District of Massachusetts challenging a provision in the Charter of the Massachusetts Democratic Party. Among the theories he advanced was a claim that the provision, as enforced by Mass. Gen. Laws Ann. ch. 53, §§ 1-121 (1975 & 1985 Supp.),

violated the First and Fourteenth Amendments of the United States Constitution. Relying on Hicks v. Miranda, 422 U.S. 332, 344 (1974), the Court of Appeals held that the claim was foreclosed by this Court's summary disposition of two appeals from the Supreme Judicial Court of Massachusetts in Langone v. Connolly, 460 U.S. 1057 (1983). See 746 F.2d 97, 100-101 (CA1 1984).

In Hicks, the Court explained the precedential effect of the dismissal "for want of [a] substantial federal question" in Miller v. California, 418 U.S. 915 (1974):

> "[Miller] was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under 28 U.S.C. § 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obligated

> to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one." 422 U.S., at 344-345.

Because the Court had jurisdiction over the appeal in Miller, the dismissal involved a rejection of "the specific challenges presented in the statement of jurisdiction." Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam).

On the other hand, the order disposing of the appeals in Langone read:

> "Appeals from Sup. Jud. Ct. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari denied. Reported below: 388 Mass. 185, 446 N.E.2d 43 [1983]." 460 U.S., at 1057 (emphasis added).

Because the Court dismissed the appeals for lack of appellate jurisdiction, we had no occasion to adjudicate the merits of the constitutional questions presented in the jurisdictional

statements. Nor did the denial of certiorari have any precedential effect. See Maryland v. Baltimore Radio, Inc., 338 U.S. 912, 919 (1950) (Opinion of Frankfurter, J., respecting denial of the petition for certiorari).

The judgment of the Court of Appeals is vacated to the extent it relied on the dismissal of the appeals in Langone, and the cause is remanded for further proceedings.

It is so ordered.

APPENDIX E

(769 F.2d 24)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1317

ALWIN E. HOPFMANN, ET AL.,

Plaintiffs, Appellants,

v.

MICHAEL JOSEPH CONNOLLY, ET AL.,

Defendants, Appellees.

ON REMAND FROM THE
UNITED STATES SUPREME COURT

Before
Campbell, Chief Judge,
Cowen,* Senior Circuit Judge,
and Bownes, Circuit Judge.

Lawrence J. Ball and Laurence Elgin on brief for appellants.

Francis X. Bellotti, Attorney General and Alexander G. Gray, Jr., Assistant Attorney General, Chief, Elections Division, on brief for appellees, Michael Joseph Connolly, Secretary of State and Francis X. Bellotti, Attorney General.

James Roosevelt, Jr., James H. Wexler, Keith C. Long, and Herrick & Smith on brief for appellees, Chester G. Atkins and The Democratic State Committee of Massachusetts.

July 31, 1985

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*Of the Federal Circuit, sitting by designation.

COWEN, Senior Circuit Judge.

In Hopfmann v. Connolly, ___ U.S. ___, 105 S.Ct. 2106 (1985), the United States Supreme Court vacated in part and remanded our decision, which is reported in 746 F.2d 97 (1st Cir. 1984). In that decision, we had held that the enforcement by the Commonwealth of Massachusetts of its Democratic Party's so-called "15 percent rule," which limits ballot access in the state primary to candidates who receive 15

percent or more of the vote in the party's convention, did not violate the United States Constitution. In rejecting one of appellants' contentions, that the rule violated the First and Fourteenth Amendments to the Constitution, we relied on the Supreme Court's summary dismissal of an earlier appeal from a decision of the Supreme Judicial Court of Massachusetts, Langone v. Connolly, 460 U.S. 1057 (1983). The Supreme Court vacated our decision to the extent that we relied on its summary dismissal in Langone, and held that this dismissal had no precedential effect.

Therefore, the sole question before us on remand is whether the enforcement by Massachusetts of its Democratic Party's 15 percent rule, which denied appellant Hopfmann access to the ballot in the 1982 Democratic primary for U.S. Senator, violated the First or

Fourteenth Amendments. Appellants contend that the state's enforcement of this rule violates their rights to freedom of association and equal protection guaranteed by these amendments. As we understand their brief, they do not maintain as the plaintiffs in the Langone case apparently argued before the Massachusetts courts, that Massachusetts statutes per se bar the state from enforcing the 15 percent rule.1/

Moreover, even if such a contention were before us, the Supreme Judicial Court of Massachusetts has construed the state's statutory ballot access requirements in Langone to encompass, rather

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1/ Appellants argue here that Massachusetts has not statutorily delegated its constitutional authority to conduct Senatorial elections to any political party. This argument was apparently made only as the basis for their contention, disposed of in our earlier decision, that the 15

than to exclude, the Democratic Party's 15 percent rule.

> For the purpose of evaluating the plaintiffs' claims that the 15% rule violated rights guaranteed to them by the Federal and State Constitutions, we treat the rule as though it were expressly contained in G.L. c. 53.

Langone v. Secretary of the Commonwealth, 388 Mass. 185, 195; 446 N.E.2d 43, 48 (1983). We are bound to follow this interpretation of state law by the state's highest court, absent extreme circumstances not present in this case. Mullaney v. Wilbur, 421 U.S. 684, 691 (1975).

A challenge to the validity of the 15 percent rule on First and Fourteenth

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(footnote continued)

> percent rule violates the "time, place, and manner" provisions of Article I, Section 4 of the Constitution. See 746 F.2d at 101-02.

Amendment grounds was also exhaustively refuted by the Supreme Judicial Court of Massachusetts in Langone, 446 N.E.2d at 48-51. Like the district court below, we agree with the analysis of this issue by the Massachusetts court, and do not consider it necessary to repeat that court's discussion at length. Both the rationale and the result reached in Langone are amply supported by the decisions of the United States Supreme Court, which are cited therein. It suffices to say that the 15 percent rule's infringement of appellants' rights to associate and express political ideas, as well as their right to equal protection of the laws, is not substantial. For example, the rule does not discriminate against any class of candidates or voters, and does not disqualify any candidates from appearing on the general election ballot. Cf.

Bullock v. Carter, 405 U.S. 134, 142-44 (1972); Jenness v. Fortson, 403 U.S. 431, 438-42 (1971). Moreover, the 15 percent rule promotes the legitimate and important state interest of "prevent[ing] the clogging of its election machinery, avoid[ing] voter confusion, and assur[ing] that the winner is the choice of a majority, or at least a large plurality, of those voting, * * *." Storer v. Brown, 415 U.S. 724, 732 (1974); Bullock v. Carter, 405 U.S. at 145.

Pursuant to the standards which have been utilized by the Supreme Court in ballot access cases, it becomes apparent that the 15 percent rule does not "unfairly or unnecessarily burden[] the availability of political opportunity." Anderson v. Celebreeze, 460 U.S. 780, 793 (1983). Therefore, we hold that appellants' contention that the 15

percent rule violates the First and Fourteenth Amendments is without merit.

The remand does not require and we find no reason for reviewing or disturbing the remainder of our previous decision. Accordingly, the judgment of the district court dismissing appellants' claims is again affirmed.

AFFIRMED.

APPENDIX F

ARTICLE 1

§ 3. The Senate; how constituted; impeachment trials

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments

until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall choose their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of the President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting

for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

§ 4. Election of Senators and Representatives

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

AMENDMENT 1

Freedom of religion, speech and press; peaceful assemblage; petition of grievance

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 14

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT 17

Popular election of Senators

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

CHAPTER 52

§ 10. Rules and regulations

A state, city or town committee may make rules and regulations consistent with law, for its proceedings, and a state committee may make rules and regulations, consistent with law, for calling conventions.

Added by St. 1938, c. 346, § 1.

§ 2. Nominations; necessity; procedure

Except in the case of municipal nominations where a city charter or a law applying specially to a particular town otherwise provides, candidates of political parties for all elective offices, except presidential elector, shall be nominated and members of political committees, except as provided in sections one and four of chapter fifty-two, shall be elected, in primaries or caucuses, and the nomination of any party other than a political party, in any district containing more than one ward or town, shall be made by a convention of delegates chosen by causes held under section one hundred and seventeen in the wards and towns of the district for which the nomiantion is to be made. All nominations and elections in primaries

and caucuses shall be by direct plurality vote. No candidates shall be nominated, and no member of a political committee or convention delegate elected, in any other manner than is provided in this chapter or chapter fifty-two.

Amended by St.1975, c. 600, § 7.

§ 6. Nomination papers; number of signatures

Nominations of candidates for any offices to be filled at a state election may be made by nomination papers, stating the facts required by section eight and signed in the aggregate by not less than such number of voters as will equal two per cent of the entire vote cast for governor at the preceding biennial state election in the commonwealth at large or in the electoral district or division for which the officers are to be elected; provided, however, that in no event shall the number of signatures required be less than the number required of the candidate of a political party for the same office in the same electoral district or division to have his name placed on the primary ballot as provided for under section forty-four. If in any

electoral district or division the aggregate number of signatures required cannot be calculated due to changes in districts or in precinct or ward lines used in the first election after any redistricting, the aggregate number shall be twice the number required for the office under section forty-four. In the case of the offices of governor and lieutenant governor, only nomination papers containing the names and addresses of candidates for both offices shall be valid. Nominations of candidates for offices to be filled at a city or town election, except where city charters or general or special laws provide otherwise, may be made by like nomination papers, signed in the aggregate by not less than such number of voters as will equal one per cent of the entire vote cast for governor at the preceding biennial state election in the

electoral district or division for which the officers are to be elected, but in no event by less than twenty voters in the case of an office to be filled at a town election; provided, however, that no more than fifty signatures of voters shall be required on nomination papers for such town office. At a first election to be held in a newly established ward, the number of signatures of voters upon a nomination paper of a candidate who is to be voted for only in such ward shall be at least fifty.

No person may be nominated as an unenrolled candidate for any office to be filled at a state election, or a city or town election following a primary, if he has been enrolled as a member of a political party, as defined in section one of chapter fifty, during the ninety days prior to the last day for filing

nomination papers as provided in section ten.

Amended by St.1976, c. 234, § 1; St.1977, c. 546, § 3; St.1979, c. 745, § 1.

§ 9. Certificate of nomination and nomination papers; certification of candidate as registered voter; acceptance; statement of financial interest; filing

Certificates of nomination and nomination papers for state offices shall be filed with the state secretary and he shall forthwith issue to the candidate or other person filing the same a certificate acknowledging the time and date of the receipt thereof. Certificates of nomination or nomination papers for city and town offices shall be filed with the city or town clerk. Any candidate not required by section forty-eight of this chapter to file a certificate of party enrollment shall, on or before the last day provided by law for filing nomination papers, file a certificate from the registrars of voters of the city or town wherein such candidate is a registered voter,

certifying that such candidate is a registered voter in such city or town. Said registrars shall issue such a certificate forthwith upon request of any such candidate so registered or of his authorized representative. No nomination paper shall be received or be valid unless the written acceptance of the candidate thereby nominated shall be filed therewith. No nomination paper or certificate of nomination of a candidate for public office, as defined by chapter 268B, shall be accepted by the state secretary nor be valid unless accompanied by a receipt from the state ethics commission verifying the fact that a statement of financial interest has been filed pursuant to the provisions of said chapter 268B.

Amended by St.1976, c. 86; St.1978, c. 210, § 3.

§ 37. Party enrolment of voters

The voting lists used at primaries shall contain the party enrollment of the voters whose names appear thereon established as provided in this section, in section thirty-eight, and in section forty-four of chapter fifty-one. Except as provided by section thirty-seven A, a voter desiring to vote in a primary shall give his name, and, if requested, his residence, to one of the ballot clerks, who shall distinctly announce the same, and, if the party enrolment of such voter is shown the voting list, the name of the party in which he is enrolled. If the party enrolment of the voter is not shown on the voting list he shall be asked by the ballot clerk with which political party he desires to be enrolled, and the ballot clerk, upon reply, shall distinctly announce the

name of such political party and shall record the voter's selection upon the voting list. The ballot clerk shall then give the voter one ballot of the political party in which he is thus enrolled.

After marking his ballot the voter shall give his name, and, if requested, his residence, to the officer in charge of the voting list at the ballot box, who shall distinctly announce the same. If the party enrolment of the voter is shown on the voting list he shall also make announcement of such enrolment and the officer in charge of the ballot box shall, before the voter's ballot is deposited, ascertain that it is of the political party in which such voter is enrolled. If the enrolment of the voter is not shown on such voting list, the officer in charge of the ballot box shall announce the political party whose

ballot the voter is about to deposit, and the officer in charge of the voting list shall repeat the same distinctly and record the same upon such voting list.

The voting lists used at primaries shall be returned to the city or town clerk to be retained in his custody as long as he retains the ballots cast, whereupon such voting lists shall be transmitted to the registrars of voters for preservation for two years, after the expiration of which they may be destroyed. Said officers shall, at any time after the primary, upon receiving a written request therefor signed by any person, furnish a copy of said list to such person upon the payment of a reasonable fee or shall allow such person to examine and copy such list without charge under such supervision as the clerk may reasonably require. The

party enrolment of each voter, if any, shall be recorded in the current annual register of voters, and whenever a voter shall establish, cancel or change his enrolment it shall likewise be so recorded. In preparing the current annual register of voters, the party enrolment, if any, of each voter included therein, as shown by the register of voters for the preceding year, shall be transferred thereto. Upon receipt of a written request from a primary candidate or any officer of any ward, town or city committee or duly organized political committee for a copy of the party enrolment list of voters in any city or town, the board of registrars or the election commissioners, as the case may be, shall prepare said list and shall furnish at once the said list, free of charge, to the party requesting the same and they shall also furnish a

copy of said list to any person on payment of a reasonable fee, not to exceed the cost of printing such list.

Amended by St.1976, c. 310, § 2; St.1977, c. 829, § 7; St.1977, c. 879, § 3.

§ 38. Party designation of voters and eligibility to vote under party enrollments; certificate

No voter enrolled under this section or section thirty-seven shall be allowed to receive the ballot of any political party except that with which he is so enrolled; but, except as otherwise provided by said section thirty-seven, a voter may, except within a period beginning at ten o'clock in the evening of the twenty-eighth day prior to a state or presidential primary or the twentieth day prior to a special state primary or city or town primary and ending with the day of such primary, establish, change or cancel his enrolment by forwarding to the board of registrars of voters a certificate signed by such voter under the pains and penalties of perjury, requesting to have his enrolment established with a party,

changed to another party, or cancelled, or by appearing in person before a member of said board and requesting in writing that his enrolment be so established, changed or cancelled. The processing of an absentee ballot to be used at a primary shall also be deemed to establish the enrolment of a voter in a political party, effective as of the date of said processing. Except as otherwise provided in section twelve of chapter four, sections one and two of chapter fifty-two, sections twenty-six, forty A and forty-eight of this chapter, such enrollment, change or cancellation shall take effect forthwith following the receipt by said board of such certificate, or such appearance, as the case may be; provided, however, that no such enrollment, change or cancellation shall take effect for a state or presidential primary during the

twenty-eight days prior to that primary or for a special state primary or city or town primary during the twenty days prior to that primary. No voter enrolled as a member of one political party shall be allowed to receive the ballot of any other political party, upon a claim by him of erroneous enrolment, except upon a certificate of such error from the registrars, which shall be presented to the presiding officer of the primary and shall be attached to, and considered a party of the voting list and returned and preserved therewith; but the political party enrolment of a voter shall not preclude him from receiving at a city or town primary the ballot of any municipal party, though in no one primary shall he receive more than one party ballot.

At primaries the city or town clerk shall make available within the polling

place certificates to enable a voter to change his party enrollment, which shall be in substantially the following form:

Name_____
(Print)

Date_____

Address_____

I hereby request that my political party enrollment be changed as follows:

From:_____
(Name of party or Unenrolled)

To: _____
(Name of party or Unenrolled)

Signed under the pains and penalties of perjury.

_____
(Signature)

On the same day as he casts his ballot, the voter may transmit the certificate to the city or town clerk, who shall transmit them as soon as possible after the primary to the board of registrars, to be retained in their custody. The party enrolment of each voter shall be recorded in the current

annual register of voters, and whenever a voter shall establish, cancel or change his enrolment it shall likewise be so recorded.

Said board shall forthwith notify each voter transmitting any such certificate that the same has been received and that his enrolment has been established, changed or cancelled in accordance with his request or that said certificate is void and of no effect, if such be the case.

Amended by St.1977, c. 546, §§ 4, 5; St. 1979, c. 745, § 3.

§ 44. Nomination papers; number of signatures

The nomination of candidates for nomination at state primaries shall be by nomination papers. In the case of the governor, lieutenant-governor, attorney general and United States senator, nomination papers shall be signed in the aggregate by at least ten thousand voters; in the case of the state secretary, state treasurer and state auditor, they shall be signed by at least five thousand voters. Such papers for all other offices to be filed at a state election shall be signed by a number of voters as follows: for representative in congress, two thousand voters; for councillor, district attorney, clerk of courts, register of probate, register of deeds, county commissioner, sheriff and county treasurer, one thousand voters, except

that in Barnstable, Berkshire, Franklin, and Hampshire counties such papers for nomination to the office of clerk of courts, register of deeds, county commissioner, sheriff and county treasurer shall be signed by five hundred voters; for state senator, three hundred voters; for representative in the general court and commissioners to apportion Suffolk county, one hundred and fifty voters. If ten percent of the number of voters in the respective district who are enrolled in the party whose nomination the candidate seeks in a lesser number than the number otherwise required by the preceding sentence, then the number of voters required shall be such ten percent or shall be fifty percent of the number of voters otherwise required by the preceding sentence, whichever is greater. The total number of such

enrolled voters shall be determined from the records in the office of the state secretary. In Dukes and Nantucket counties such papers for nomination to all offices within the county to be filled at any state election shall be signed by twenty-five voters.

Amended by St.1976, c. 47; St.1977, c. 136; St.1981, c. 278, § 1.

§ 46. Nomination papers; submission to registrars; certification; correction of district; number of names

Every nomination paper of a candidate for a city or town office shall be submitted on or before five o'clock post meridian of the fourteenth day preceding the day on which it must be filed, to the registrars of the city or town in which the signers appear to be voters. Every nomination paper of a candidate for state office shall be submitted on or before five o'clock post meridian of the twenty-eight day preceding the day on which it must be filed with the state secretary to the registrars of the city or town in which the signers appear to be voters. Every nomination paper of a candidate for president at the presidential primaries shall be submitted to said registrars on or before five o'clock post meridian of

the fourteenth day before the final date for filing said papers with the state secretary and certification of said papers shall be completed no later than the seventh day before the final day for filing said papers with the state secretary. Nomination papers for candidates for state, ward, and town committees shall be submitted to said registrars on or before five o'clock post meridian on the eleventh day before the final day for filing with the state secretary and certification shall be completed no later than the fourth day before the final day for filing said papers with the state secretary. Each nomination paper shall be marked with the date and time it was submitted and such papers shall be certified in order of submission. Said registrars shall check each name to be certified by them on the nomination paper and shall

forthwith certify thereon the number of signatures so check which are names of voters both in the city or town and in the district for which the nomination is made, and who are not enrolled in any other party than that whose nomination the candidate seeks, and only names so checked shall be deemed to be names of qualified voters for the purpose of nomination. The registrars shall place next to each name not checked symbols indicating the reason that name was disqualified. The certification of voters shall be signed by a majority of the board of registrars.

The registrars shall inform the candidate submitting such papers if the designation of the district only in which he seeks office is incorrect, and shall give said candidate the opportunity to insert the correct designation on such papers before the

signatures are certified. The registrars shall, if the candidate so desires, allow a change of district on the nomination papers in the presence of the candidate whose name appears on the nomination papers, and the registrar and the candidate shall both initial the change of district so made and further shall in writing explain the change of district causing three copies to be made, on of each for the registrar and candidate and one to be attached to the nomination papers. If the correct district designation is not so inserted, the nomination papers shall not be approved. In no case may a correction be made to change the office for which such candidate is nominated.

The provisions of section seven relative to the number of names to be certified and received, and, except as otherwise provided in this section, the

provision relative to time of certification shall apply to such papers. For the purpose of certifying the names on primary nomination papers the registrars shall hold meetings on the fourth Tuesdays next preceding the seventh day before the final day on which such papers are required to be filed with the state secretary, except that for primaries before special elections the meetings shall be held on the two Tuesdays next preceding such date, and except that for presidential primaries, the meetings for certifying papers for candidates for state, ward, and town committees shall be held on the four Tuesdays next preceding the fourth day before the final day for filing said papers with the state secretary, except that the fifth Tuesday shall be substituted for that Tuesday on which any city or town holds its local election.

No person shall be candidate for nomination for more than one office; but this shall not apply to candidates for membership in political committees.

Amended by St.1975, c. 139, § 1; St.1975, c. 600, § 11; St.1977, c. 329, § 3; St.1977, c. 927, § 11; St.1980, c. 134, §§ 5, 6; St.1982, c. 283, § 2.

CHAPTER 53

§ 48. Nomination papers; time for, and acknowledgment of, filing; certificate to printing name on ballot

Nomination papers of candidates to be voted on at presidential primaries except candidates for state, ward and town committees, shall be filed with the state secretary on or before the first Friday in January preceding the day of the primaries.

Nomination papers of candidates for election to state, ward and town committees at presidential primaries shall be filed with the state secretary on or before the third Tuesday in November of the year preceding said presidential primaries.

All certificates of nomination and nomination papers of candidates for the office of state representative, state senator, executive council, or county office shall be filed with the state

secretary on or before the last Tuesday in May of the year in which a state election is to be held. Certificates of nomination or nomination papers for the office of senator in congress, representative in congress, governor, lieutenant governor, attorney general, treasurer and receiver general, state auditor and state secretary, shall be filed on or on1/ before the first Tuesday in June of the year in which a state election is to be held. In the case of primaries before special elections, such nomination papers shall be filed on or before the fifth Tuesday preceding the day of the primaries. The state secretary shall forthwith issue to the candidate or other person filing such nomination papers a certificate acknowledging the time and date of the receipt thereof.

1/ So in enrolled bill.

There shall not be printed on the ballot at the state primary the name of any person as a candidate for nomination for any office to be filled by all the voters of the commonwealth, or for representative in congress, governor's councillor, senator in the general court, representative in the general court, district attorney, clerk of court, register of probate and insolvency, register of deeds, county commissioner, sheriff, or county treasurer, unless a certificate from the registrars of voters of the city or town wherein such person has been a registered voter for more than ninety days and that he has been enrolled as a member of the political party whose nomination he seeks on or before the ninetieth day prior to the last day herein provided for filing nomination papers with the state secretary is filed

with the state secretary on or before such filing deadline. Said registrars shall issue such a certificate, signed by a majority thereof, forthwith upon request of any such candidate so enrolled or of his authorized representative. Said registrars of voters shall issue such certificate to any person seeking the nomination of a political party, who is a newly registered voter of that city or town enrolled in that political party and who has not been an enrolled member of another political party during the year preceding the last day for filing nomination papers with the state secretary. No such certificate shall be issued to any person who is a candidate for nomination for any such office, if such person has been an enrolled member of another political party during the year prior to the last day for filing

nomination papers with the state secretary as provided by this section.

There shall not be printed on the ballot at a city or town primary the name of any person as a candidate for nomination for any office to be filed at a city or town election unless such person has become an enrolled member of the political party whose nomination he seeks on or before the ninetieth day prior to the last day for submitting primary nomination papers to the registrars of voters prior to said primary.

The name of a candidate for election to any office who is nominated otherwise than by a political party, generally referred to as an "Unenrolled" candidate, shall not be printed on the ballot at a state election, or on the ballot at any city or town election following a city or town primary, unless

a certificate from the registrars of voters of the city or town wherein such person is a registered voter, certifying that he is not enrolled as a member of any political party, is filed with the state secretary or city or town clerk on or before the last day herein provided for filing nomination papers. Said registrars shall issue each certificate forthwith upon request of any such candidate who is not a member of a political party or his authorized representative. No such certificate shall be issued to any such candidate who shall have been an enrolled member of any political party ninety days prior to the last day for filing nomination papers as provided by this section.

Amended by St.1975, c. 139, § 2; St.1975, c. 600, § 12; st. 1976, c. 234, § 2; St. 1977, c. 546, §§ 7, 8; St.1977, c. 879, § 5; st.1977, c. 927, § 12A; St.1979, c. 745, § 4.

§ 116. Certification of results; summonses; certificates of election

The governor shall, in the presence of at least five councillors, certify to the results of the examination of the copies of the records of votes cast for governor and lieutenant governor, for councillors, for state secretary, state treasurer, state auditor and attorney general, and for senators and representatives in the general court, and shall issue his summons to such persons as appear to be chosen to said offices. The governor shall issue certificates of election to such persons as appear to be chosen to the offices of senator in congress, representative in congress, clerk of the courts, register of probate and insolvency, sheriff and district attorney, which shall be countersigned and transmitted by the

state secretary. No certification shall be made or summons or certificate issued under this section until after five o'clock in the afternoon of the fifteenth day following a state election or, in case a state-wide recount is held in accordance with section one hundred and thirty-five, until the tabulation and determination under the preceding section have been revised in accordance with the results of such recount.

Amended by St.1946, c. 130, § 3.

CHAPTER 54

§ 116A. Election of person not listed on state ballot; financial interest statement

Any person whose name does not appear on the state election ballot, but who receives sufficient votes to elect him to an office appearing on said ballot, shall within three days after the certification of his election file a statement of financial interest under chapter two hundred and sixty-eight B with the state ethics commission, if he has not already done so.

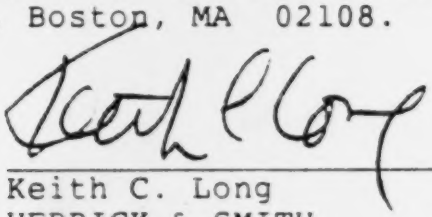
Added by St.1981, c. 386, § 13.

CERTIFICATE OF SERVICE
UNDER RULE 28

I, Keith C. Long, counsel of record for appellees Chester G. Atkins and The Democratic State Committee of Massachusetts, do hereby certify that I am a member of the bar of this Court, and that I have served three true and accurate copies of this Motion on each of the other parties to this appeal by delivery to their counsel of record in the following manner:

By Federal Express (overnight delivery), all charges prepaid, upon Laurence A. Elgin, Esq., 2762 Woodley Place, N.W., Washington, D.C. 20008 (counsel of record for appellants).

By First Class Mail, all charges prepaid, upon Thomas R. Kiley, Esq., First Assistant Attorney General, Office of the Attorney General, One Ashburton Place, Room 2001, Boston, MA 02108.



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Dated: January 24, 1986

EDITOR'S NOTE

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No. 85-1094

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Appellants,

v.

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Appellees.

On Appeal from the United States Court of Appeals for the First Circuit

Opposition To The Motion Of Appellees Atkins And The Democratic State Committee To Dismiss Or Affirm

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25 pp

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I. CONCERNING THE CHALLENGE TO APPELLANTS' ASSERTION OF JURISDICTION

Opening the argument (p.30), these appellees assert, (See also the other motion (n.1)), that "no state statute has been invalidated," and that, therefore, "NO APPEAL LIES TO THIS COURT UNDER 28 U.S.C. 1254 (2)." Appellants rely upon the pre-emption doctrine set out in Malone v White Motor Corp., 435 US 497 (1978). The statutory language provides that cases in the courts of appeals may be reviewed:

> "By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution,...of the United States,..."

Malone holds that the courts of appeals need not articulate that they are holding the statute in question to be invalid in order for the appeal to lie. It is sufficient if the effect of their holding is to pre-empt the state statutes.

The statute 1973 Mass. Acts c.429

specifically revoked authority for party pre-primary conventions, as appellants have brought up several times. That 1973 Act removed the language authorizing parties to have such conventions from the General Laws and, with one exception, which appears to have been an oversight, removed from the general laws parallel references to such conventions, including former language cross-referencing to them as an alternative method of ballot access. (Jurisdictional Statement, pp. 8-14, and pertinent text of the Act in Appendix) On the other hand these appellees insist that the 15% rule is part of the statutory scheme, and even accuse the appellants of attacking the statutory scheme itself rather than attacking their trick of alleged "incorporation" of a private rule

into that scheme. By simple deductive logic it is obvious that a statute repealing all authority for such conventions and a rule requiring them cannot both be valid statutes. If one is valid then the other is invalid by pre-emption, whether the court deigns to articulate that pre-emption or not. The lower court has upheld the rule as a statute. Therefore the 1973 Act has been pre-empted and held invalid. Silence on the point doesn't alter the fact of the invalidation by pre-emption. This, as appellants understand it, is the Malone pre-emption doctrine. It is a wise doctrine, and a needed one, as this case illustrates, one which would seem to prevent judges from frustrating appeals to this Court by ignoring the pre-emption

which they have effectively decreed.

Another point should be made in refutation of the argument of appellees that there is no jurisdiction for an appeal: They argue that an "accomodation" has taken place so that the party rule has become part of the state statutory scheme. The "accomodation" is itself a pre-emption of the statutory provisions as they stood. Both the 1973 Act, with its clear intent to eliminate party pre-primary conventions as part of the nomination process, and the language of the statutory provisions, as it has stood for many years, make clear that the asserted federal First Amendment right which the party insiders claim gives them the right to insert their private rule into the statutory scheme pre-empts the statutory provisions making the

"method of nomination papers" exclusive. The history of the statutes involved shows clearly that since the "LaFollete Reforms" swept the country at the turn of the century, Massachusetts has had the "method of nomination papers" as the only requirement for ballot access, except for the period from 1953 until 1973, when pre-primary party convention nomination was made an alternative method. That language stood for over 80 years prior to the SJC's upholding the party's claim of this unusual First Amendment power and no one during that entire time ever claimed that it allowed political parties to impose additional burdens on ballot access. This pre-empting claim of First Amendment authority has now been upheld in turn by both the district and circuit

courts, as all appellees admit. No assertion has ever been made in this litigation that the provisions of the state statutory scheme did not make the "method of nomination papers" the only requirement for ballot access prior to the SJC's discovery of the claimed extension of the First Amendment freedom of association in its "exhaustive" 17 day analysis.

See notes 1-3, and 9 in the Jurisdictional Statement and the fuller text in the Appendix for the language of the provision, from which we excerpt here to reemphasize the point, and for the holdings of the state's highest court on statutory interpretation:

> "Candidates shall be elected, in primaries...no candidate shall be nominated in any other manner than is

> provided in this chapter... no names shall be printed on a ballot other than those presented on nomination papers....Primaries shall be held for the nomination of candidates of political parties for all offices to be filled at a state election....The nomination of candidates for nomination at state primaries shall be by nomination papers... Ballots... shall contain the names of all candidates duly nominated...."

(emphasis added) There is nothing unclear about this language. Exegesis of the kind resorted to here in order to perpetrate this ruse (J.S., pp. 59-60) violate state and federal canons of statutory interpretation. The holding of the court of appeals affirming the district court's deferral to the state court on the constitutional questions pre-empts these clear statutory provisions as a matter of law regardless of the evasion by the court of the consequence of its action. If

nomination is by primary, if the only way to get on the primary ballot is by nomination papers, and if all who've their nomination papers are to be on the ballot, then these provisions are pre-empted by the "incorporated" rule's requirement of a supplemental showing of support at the convention which the legislature rejected. Further, where as here, the choice of the party's candidate is made at the convention, the statutory provisions are clearly pre-empted, unless one buys off on the notion that the mere unexercised possibility of a write-in candidacy is adequate compensation for this "jaybird" blockage of access to the ballot in violation of the opinion of a majority of this Court in Lubin v Panish, 414 US 709 (1974) and the single justice opinion in

McCarthy v Briscoe, 429 US 317, a notion which the appellees and the lower courts have advanced.

Appellants are aware of the success of the appellees up to this point in their attempts to obscure the reality of this pre-emption. Appellants acknowlege that neither the appellees nor the lower courts have admitted that the rule and the state statutory scheme are in conflict. They, have, as it were, stuck to the game plan. But logic dictates what political expediency refuses to acknowledge. Neither the 1973 Act nor the state statutory scheme as it reads and was understood prior to the introduction of the alleged extension of the First Amendment freedom of association can exist and be valid simultaneously with the addition of the rule to the statutory

scheme. So whether the appellees call it "accomodation," "incorporation," "adding to," "as though it were explicitly contained therein," or whatever, in their struggle to preserve this coup d'etat of a political machine against the Constitution, the truth is that the party rule has pre-empted the state statutory law as it was in a manner that the legislature itself, as the only lawmaking body that the state law itself recognizes, decisively rejected. If the statutory scheme so readily "accomodates" the rule why did the legislature reject the changes on no less than 8 occasions ?

Appellants challenge the deference which the lower federal courts have given the federal constitutional interpretation rendered by the state court in this case.

Appellees now acknowledge that the lower federal courts have made no independent analysis of the 1st and 14th Amendment questions at issue, but have instead deferred to the "exhaustive" analysis of the SJC. Curiously, these appellees, state in the 2d paragraph of their argument summary (p.24) that:

> "Hopfmann's argument that the Massaschusetts Democratic Party did not have the right under the First and Fourteenth Amendments to the United States Constitution to adopt the '15% Rule' and have it enforced by the state has already been exhaustively refuted by the Massachusetts Supreme Judicial Court in its comprehensive and well-reasoned unanimous opinion...."

In the immediately preceding paragraph they stated that the First Circuit had upheld a state statutory scheme against federal constitutional attack and that the appellants have presented no substantial

federal questions. It is a curious world, is it not, in which federal constitutional rights change the long understood meanings of state statutory schemes and then, voila', become a part thereof so as to be immune from federal scrutiny forevermore ?

Three members of the Court have noted: "The Massachusetts Supreme Judicial Court construed Chapter 53 to recognize the Democratic party's 15% rule because it believed that such a construction was required by the United States Constitution in order to avoid an impermissible infringement of the associational rights of party members." Bellotti v Connolly, 460 US 1057 (1983) (p. 2 of the dissent by Stevens, Rehnquist and O'Connor.) In granting cert in the present case before,

this Court characterized the application of the claimed combination of the freedom of association right to make the rule and be governed by it, plus the private lawmaking authority to add it to the statutory scheme as "the provision, as enforced by Mass. Gen. Laws Ann. ch. 53,." The provision is "enforced" by the statutory scheme by virtue of the state court interpretation of the Constitution. Without the federal constitutional interpretation the statutes would not permit enforcement of the rule. But with it, it does. Therefore pre-emption does exist. The statutory scheme was used to enforce the right because of the power of the perpetrators of the plan to establish the primacy of the party rule to do so, as opposed to the Connecticut Republican

Party group in Tashjian, supra, that openly acknowledged the conflict and directly and openly challenged the statute. But then they did not have the same advantages of entrenched incumbency.

If this tactic designed to deprive the appellants of their right of appeal is rewarded with success by the failure of this Court to recognize that pre-emption does exist despite the obfuscation, then the tactic will be repeated. Future litigants who stand on constitutional rights against the politically powerful will be deprived of their appeal to this Court by use of the same tactic. A very dangerous precedent will be set under which lower courts can deprive litigants of their appeal to this Court by refusing to acknowledge that pre-emption occurred

when motivated to do so. All that will be needed will be an assertion of a right to "add" private rules to state laws. There will be those entrenched in incumbent political machinery who will do just that if the temptation is there.

Combined with the silent recognition of a hitherto unheard of private right to make public laws which these appellees have previously urged, and which the SJC has recognized and articulated without supporting authority, and to which the lower federal courts have deferred, this tactic of refusing to acknowledge pre-emption when it exists could result in an activist judiciary allied with powerful political party organizations reshaping many state laws despite the wishes of legislatures. Once established such power

surely would not be narrowly confined.

II. A NOTE ON SMILEY V HOLM

This is the second time that these appellees have argued that the adding of this party rule to the state statutes by a state court's interpretation of the federal Constitution complies with the mandate of Art.I, Sec.4 as interpreted in Smiley v Holm, 285 US 355 (1932). Curiously, they never seem to argue it below and the courts below have never mentioned the case. Nor has the state court mentioned it in its exhaustive analyses. Smiley makes it clear that what Art.I, Sec.4 means is that a state prescribes for congressional elections in the same manner which its laws prescribe for making all its laws. It seems incredible that these appellees would

seriously argue that laws are normally made in Massachusetts by groups within private organizations asserting extensions of emanations from the First Amendment which are then enforced by complaisant state officials pursuant to state court advisory opinions, particularly in the situation where the legislature has so emphatically rejected the alleged "law" in question by all means available to it. Perhaps appellees feel that they can blunt the insight of the members of this Court in some special way. The direct challenge to the holding of this Court in that case remains one of the strongest reasons why this Court should note jurisdiction here.

III. A NOTE ON "ELECTION DAY DEMOCRATS"

No amount of diversion will obscure that it was a small group of the party

concerned with making the "insider" machinery more dominant which launched the Charter Commission to produce the Charter in which the revival of the pre-primary convention was to be wrapped. It was most of the registered membership of the party, not "election day Democrats," who were not given any real say in the formulation of the 15% Rule. In a party of 1.3 million, the number involved at any stage in even the secondary level of participation -- selecting convention delegates -- was never more than 7.6%. The conventions were attended by 1/4 of 1% of membership and the rule was adopted as part of the charter by .06% of membership. By statute, only independents can register on the day of the primary and vote as party members. So the allegation of "raiding"

is obviously an unsubstantiable ploy and the use of the term "regular" is an attempt to create confusion between the real regular membership of some 1.3 million and the insiders attempting to concentrate private lawmaking authority in their own hands. Fear of possible influence of the candidate selection decision by those enrolled as independents signing ballot papers or enrolling as Democrats at the 11th hour is hardly justification for the removal of full participation in the candidate selection process from the over 90% of the party's regular members, members enrolled for some time. Appellees can say what they will, the inescapable truth is that this is a principle of "bossism" not one of freedom of association. While this word may be

sometimes too loosely applied in popular parlance, it fits here. Jurisdiction should be noted to make clear that the vital constitutional rights argued by the appellants are not to be twisted to deprive of their political liberties those whom they were designed to protect. The Court has not dealt with such misuse of the First Amendment in its prior decisions, possibly because such a bold attempt to use the freedom of association concept to defeat the purposes for which it was conceived has not heretofore been attempted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served, by United States mail, First Class, postage prepaid, this ____day of February, 1986, true and accurate copies of the foregoing Opposition To The Motion Of Appellees Atkins And The Democratic State Committee To Dismiss Or Affirm upon Thomas R. Kiley, Esquire, Assistant Attorney General, One Ashburton Place, Room 2001, Boston, Mass. 02108, Counsel of Record for appellees Connolly and Bellotti, 3 copies for each appellee, and upon Keith C. Long, Esquire, Herrick and Smith, 100 Federal Street, Boston, Mass. 02110, Counsel of Record for appellees Atkins and The Democratic State Committee, 3 copies for each appellee.

_____

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